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THE UNIVERSITY OF ALBERTA

CORPORATE RECEIVERSHIPS:

WHOSE AGENT IS THE PRIVATELY APPOINTED RECEIVER?

BY

WENDY L. RUSSELL



A THESIS

SUBMITTED TO THE FACULTY OF GRADUATE STUDIES AND RESEARCH
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Without the support of my entire family, this project could never have been completed. Please accept my thanks to all of you.

Special thanks must go to my husband, Gordon Sustrik, and to our three young children, Braden, Laura, and David, for their unlimited patience, love, and understanding.

Because you made this possible, I dedicate my thesis to you.

ABSTRACT

This thesis is concerned with an analysis of the issue: whose agent is the privately appointed receiver? In the absence of any contractual provision to the contrary, the privately appointed receiver acts as the agent of the debenture holder. Typically, however, security agreements contain a deemed agency clause which deems the receiver to be the agent of the debtor corporation.

According to the dominant theory which is accepted by the courts in both Canada and England, the receiver does not act simply as the agent of the debtor corporation. Rather, the privately appointed receiver maintains a dual agency status whereby he acts as the agent of both the debtor corporation and the debenture holder. Accordingly, where the receiver is managing the debtor's business, he is acting as the agent of the debtor corporation; where the receiver is liquidating the debtor's assets and realizing on the security of the debenture holder, he is acting as the agent of the debenture holder. It is also possible for the privately appointed receiver, when performing certain administrative functions, to be acting in his own right, and not as an agent.

The dual agency status which is held by the privately appointed receiver conflicts with the rule of agency law which states that there cannot be more than one principal in each agency relationship. Based upon the analysis undertaken herein, it is submitted that in order to remove this apparent conflict between receivership law and agency law, the privately appointed receiver should now be expressly acknowledged to be an exception to this general rule of one principal per transaction.

In order for added certainty to be present in this area of the law, the courts of the future must also enunciate guidelines which will define the various functions which are undertaken by the privately appointed receiver. These objective guidelines will enable others to distinguish between the privately appointed receiver's role as manager, liquidator and administrator, which in turn will greatly assist in determining whose agent is the privately appointed receiver.

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CORPORATE RECEIVERSHIPS

WHOSE AGENT IS THE PRIVATELY APPOINTED RECEIVER?

I. INTRODUCTION

Many financially troubled corporations must accept having their lender appoint a receiver who takes over the corporation for the purpose of realizing upon the lender's security. Once this occurs, the ability of the company's board of directors to act and make decisions is in effect frozen and assumed by the receiver. If the receiver is appointed simply as a receiver, he will take possession of the assets which are included in the security agreement in question and will liquidate those assets immediately for the purpose of satisfying the debt due to the security holder. If the receiver is appointed as a receiver manager, his mandate is to take control of and manage the business for a period of time and then ideally to return control over the management functions of the debtor corporation to its board of directors. If the receiver is not able to bring the corporation's business to a profitable position during the management phase, however, rather than returning the management to the company's board of directors, he will liquidate the debtor's assets and apply the proceeds received therefrom in satisfaction of the security holder's claim.

When performing these functions and dealing with the corporation's assets, the receiver must deal with other parties and must make a number of important decisions, such as:

- Is it necessary to pay the outstanding debt obligations of the corporation?
- How should the corporation's current employees be dealt with?
- At what price should the corporation's assets be sold?
- Who is responsible for contracts entered into during the management phase of the receivership?

This decision-making process in turn raises a number of questions, such as:

- Upon what basis can the receiver make these decisions?
- Is it the receiver's responsibility to answer these questions independently, or is he obligated to rely upon the advice of others?
- If he must rely on others, who must the receiver listen to?

In order to answer these questions, it is essential to determine the status held by the receiver when he is performing his function as receiver or receiver manager. Once the receiver's status has been identified it is then possible to determine the duties, obligations and liabilities of the receiver, and these in turn should provide the guidelines for the receiver to follow when making decisions.

The status of the receiver depends upon whether he has been appointed by the court, or by the debenture holder privately, pursuant to the contractual terms contained in the security agreement which is being enforced. In the case of a court appointment, the receiver acts as an officer of the court and consequently his every action is open to scrutiny before the court. A privately appointed, or instrument appointed receiver, on the other hand, acts as an agent, and is not

directly answerable to the court. As an agent, the receiver should be answerable to his principal. Thus it is the receiver's principal who should be directing the receiver and to whom the receiver must account. The exact identity of the receiver's principal, however, is open to controversy in a receivership situation, and it is this controversy which is central to this thesis.

This thesis will focus on the issue of whose agent is the privately appointed receiver. Is he the agent of the debtor corporation, or is he the agent of the debenture holder which appointed him, or is he possibly the agent of both parties? Furthermore, does the privately appointed receiver act as an agent in all situations, or is it possible for him to act independently and as a principal under certain circumstances? These queries are answered initially by an examination of the debenture or security instrument pursuant to which the receiver is appointed. At common law, in the absence of statements to the contrary contained in the debenture, the privately appointed receiver acts as the agent of the debenture holder, and as the receiver's principal, the debenture holder is liable for the acts of the receiver.¹ Typically, however, the debenture is not silent regarding the agency status of the instrument appointed receiver. It is very common for the security instrument to contain a deemed agency clause which expressly deems the receiver to be the agent of the debtor corporation.²

The effect of such deemed agency clauses is somewhat uncertain. Although the security instrument deems the receiver to be the debtor corporation's agent, it is the debenture holder who is given the power

to appoint the receiver, and often the privately appointed receiver subsequently takes instructions from and reports to the debenture holder. This raises an apparent contradiction between the principles of receivership law and agency law. According to principles of agency law, an agent is controlled and directed by, and answerable to his principal. Normally, anyone outside of the agency relationship in existence between the principal and agent is considered to be a third party with no ability to influence the actions of the principal and agent. If the deemed agency clause is to be interpreted literally, the receiver is the agent of the debtor corporation and thus pursuant to agency law principles, it is the debtor corporation that is vested with the ability to control and direct the receiver. How can this be reconciled with the receivership law practice of having the third party debenture holder appoint the receiver and in certain situations control his actions?

The origins of both the deemed agency clause and the ability of the debenture holder to appoint the receiver may be found by examining the historical development of receivership as a remedy for the enforcement of the debenture holder's security. This historical development was analyzed and summarized by Lord Justice Rigby in the 1896 English Court of Appeal decision in Gaskell v. Gosling.³ As can be seen from the following discussion, the deemed agency clause was originally developed in order to protect the debenture holder from incurring liability as a mortgagee in possession.

Historically the remedies available to a mortgagee who had loaned money to a mortgagor were very limited. Originally, the only remedy available to a mortgagee when the mortgagor failed to keep down the

interest on his security was to enter into possession. Once the mortgagee entered into possession, the mortgagee only had to account to the mortgagor in the event of a suit for redemption. If, however, the mortgagor did redeem his property, the mortgagee was then treated very severely and "made to account, not only for what he actually received, but for what he might without willful default have received."⁴ Due to the harshness of this law relating to mortgagees in possession the law courts favoured changes which enabled the mortgagee to obtain the advantages of possession without the onerous accounting requirements associated therewith. To achieve this, mortgagees began to insist upon having the mortgagor appoint a receiver:⁵

to receive the income, keep down the interest on encumbrances and hold the surplus, if any, for the mortgagor, . . . [and often, the deed would also stipulate] that the receiver should have extensive powers of management.

The next step in this progressive development of the law was for the mortgagees to stipulate that they would appoint the receiver instead of the mortgagors. "This made no difference in the receiver's position, and imposed no liability on the mortgagee appointing"⁶ because when appointing the receiver, the mortgagee merely did so as agent for the mortgagor. In time, the deemed agency clause achieved statutory recognition:⁷

first by Lord Cranworth's Act (23 and 24 Vict. c. 145) to a limited extent, and afterwards by the Conveyancing and Law of Property Act, 1881, in a more general manner, a power to the mortgagee to appoint a receiver, who was to be agent of the mortgagor was made a usual incident of mortgages, when not excluded by agreement between the parties. The last-mentioned Act extended the power to property of every description, placed the power to revoke as well as to make

the appointment in the hands of the mortgagee, gave the receiver considerable powers of management, and yet made the mortgagor solely liable for all his acts and defaults. This Act, however, only applies in default of agreement between the parties. In itself it is useful only as a statutory recognition and approval of the practice of making the mortgagee's appointee the agent of the mortgagor only.

Based upon this historical background, it would appear that it is the mortgagor, or debtor corporation who acts as the principal of the receiver. The relationship between the receiver and his principal, the debtor corporation differs from a standard principal agent relationship, however. In particular, once a receiver has been appointed, the debtor corporation cannot revoke that appointment.⁸

The mortgagor cannot of his own will revoke the appointment of a receiver, or that appointment would be useless. For valuable consideration he [the mortgagor, debtor corporation] has committed the management of his property to an attorney whose appointment he cannot interfere with.

The duties which the receiver must perform and the powers which will be given to the receiver in order to permit him to carry out his duties are all stipulated in the security document agreed to between the mortgagor, debtor corporation, and the mortgagee, debenture holder. According to the decision in Gosling v. Gaskell, the mortgagor is bound by the clauses which bestow those powers and duties. Further, the mortgagor, or debtor corporation, is considered to be the principal of the receiver when the receiver carries out those powers and duties, because the mortgagor has contractually agreed that that will be the case.⁹

The receiver's appointment and all directions and powers given and conferred upon him, were supposed to emanate from the mortgagor, and the mortgagee, though he might be the actual appointer, and might have stipulated for all the powers conferred upon the receiver, was in no other

position, so far as responsibility was concerned, than if he had been altogether a stranger to the appointment.

Consequently when a deed provides that the receiver shall be appointed by the trustee debenture holders, and that "any person so appointed shall be the agent of the company, who alone shall be liable for his acts and defaults,"¹⁰ the House of Lords held that the receiver is the agent of the debtor company as is literally stated in the deemed agency clause. The purpose of including a deemed agency clause in a security instrument is to prevent the debenture holders from becoming the principal of the receiver.¹¹

Subsequent cases have identified additional reasons for the inclusion of a deemed agency clause in a debenture. The following benefits have been either associated with or attributed to a deemed agency clause:

- it allows the receiver to bring action in the name of the company;¹²
- the debtor corporation is liable for the actions of the receiver, thereby protecting the receiver vis-a-vis third parties;¹³
- neither the receiver nor the debenture holder are liable on contracts to third parties;¹⁴
- the debenture holder is not liable for the receiver's remuneration;¹⁵
- the deemed agency clause confirms title to the debtor corporation's goods with the receiver and thereby allows the receiver to pass title to third parties;¹⁶ and

- the deemed agency clause exonerates the debenture holder from liability for the receiver's actions.¹⁷

These judicially recognized rationale for the inclusion of deemed agency clauses in security instruments fail to address the basic conflict which exists between principles of receivership law and of agency law. That is, if the receiver is truly the agent of the debtor corporation, upon what basis and to what extent can the debenture holder, as a third party to that agency relationship, validly interfere with and direct the actions of the receiver?

This thesis will examine the agency status of the privately appointed receiver with a view to determining the true purpose and effectiveness of deemed agency clauses. In order to accomplish this, it will be necessary first to examine, in general terms, the bases for the appointment of a receiver, the means of appointment of a receiver, the status, powers, duties, and liabilities of a receiver and general agency law concepts. Once this background material is in place, it will then be possible to analyze, in detail, Canadian and English jurisprudence which deal with the agency status of the privately appointed receiver. This analysis will illustrate the ongoing development of the law in both jurisdictions, and will result in a statement of the dominant theory which is currently accepted in both Canada and Britain regarding whose agent is the privately appointed receiver. Although the British and Canadian theories relating to this issue are presently the same, it will be seen that these two legal systems have approached the issue and arrived at their respective positions independently and by following different developmental paths. Having stated the dominant theory

regarding whose agent is the privately appointed receiver, this thesis will conclude with an analysis of the strengths and weaknesses of this theory, together with suggestions for reform of the law in this area.

ENDNOTES

CHAPTER I

1. Robinson Printing Co., Limited v. Chic, Ltd., [1904] 2 Ch. D. 123.
2. F. Bennett, Receiverships (1985) 20. Also see infra Chapter IV. B. 1. for a sample deemed agency clause.
3. [1896] 1 Q.B. 669 (Eng. C.A.). Rigby L.J.'s dissent in the Court of Appeal was subsequently approved by the House of Lords in Gosling v. Gaskell [1897] A.C. 575 (H.L.). See infra Ch. VI. B.2. for further discussion of this case.
4. Id. at 691.
5. Id. at 692.
6. Id.
7. Id. at 693.
8. Id. at 692. Also see Sowman v. David Samuel Trust Ltd., [1978] 1 W.L.R. 22 at 29 (Eng. Ch. D.).
9. Gaskell v. Gosling, id. at 693.
10. Id. at 696.
11. Id. Deemed agency clauses are "decisive of the question whether by the appointment, the trustees became principals of the receiver. They are inserted for the very purpose of preventing such a result." Also see Meigh v. Wickenden, [1942] 2 K.B. 160 at 165 (Eng. K.B.).
12. Peat Marwick Ltd. v. Consumers' Gas Co. (1980), 113 D.L.R. (3d) 754 at 760 (Ont. C.A.).
13. Re Paradise Gardens Restaurant Ltd. (1982), 41 C.B.R. (N.S.) 297 at 303 (Alta. Q.B.).
14. Peat Marwick Ltd. v. Consumers' Gas Co., supra n. 12 at 762.
15. Id. Also see Meigh v. Wickenden supra n. 11 at 166.
16. R. v. Coopers & Lybrand Ltd. (1980), 34 C.B.R. (N.S.) 97 at 108 (Fed. C.A.). Also see Peat Marwick Ltd. v. Consumers' Gas Co. supra n. 12 at 762.
17. R. v. Coopers & Lybrand Ltd., id.

II. BASES FOR THE APPOINTMENT OF A RECEIVER

- A. Definition of Receiver
- B. Equitable and Statutory Regulation of Receivers
- C. Contractual Regulation of Receivers
- D. Receivership Distinguished from Bankruptcy and Equitable Execution
- E. Other Bases for the Appointment of a Receiver

II. BASES FOR THE APPOINTMENT OF A RECEIVER

A. Definition of Receiver

"A receiver is a person [who is] appointed to take into his possession, get in, or recover, property for the benefit of the persons who are ultimately determined to be entitled to it."¹ Often, in addition to these powers of realization, the ability to manage the business is given to the receiver, in which case, he is referred to as a receiver and manager.²

A receiver is appointed to preserve property and, where necessary, to collect income for the benefit of those entitled to it. For the achievement of this purpose, he will receive the rent or other income arising from the property, and he will pay the necessary outgoings. A receiver, however, is not a manager of a business, and the effect of appointing a receiver to a going concern is that it stops forthwith, its assets are realized, its debts paid, and any surplus distributed to those entitled to it. Therefore, where immediate realization is not desired, the appointment will be of a manager who has power to continue the business in accordance with the general practice in that trade.

The distinction between a receiver and a receiver and manager has been succinctly stated as follows: "The primary duty of a receiver is to

receive, whereas the primary duty of a receiver and manager is to manage."³

Notwithstanding the conceptual difference between the function of a receiver and of a receiver and manager, it is most common to use these terms interchangeably since "in practice, a receiver is usually appointed as both a receiver and a manager."⁴ Because the term receiver is often used to include the management duties which are technically associated with a receiver and manager,⁵ the term receiver shall be used in this broader sense throughout this thesis except where the distinction between the two types of receiver is an important one.

There are many different situations in which the appointment of a receiver may be necessary. It is common to appoint a receiver in a commercial lending situation in order to enforce a security agreement and thereby to recover the lender's security if it is deemed to be at risk. Receivership is the state which exists when a receiver is appointed to enforce the security instrument which is held by the security holder. It is in the context of such commercial lending situations that the issue of the agency status of the privately appointed receiver generally arises, and thus the appointment of a receiver in a commercial transaction will be examined in detail herein.

Equitable, statutory and contractual principles govern both the appointment and conduct of receivers. When determining the agency status of the privately appointed receiver, it is necessary to have regard to all of these influences and to determine what effect each has on the receiver's status as agent.

B. Equitable and Statutory Regulation of Receivers

Historically, the court's ability to appoint a receiver was considered to be an equitable remedy. It has been referred to as "one of the oldest remedies in this court."⁶ As with many other equitable remedies, the principles governing receivers have over time become codified. Typically, it is provincial Judicature Acts which enunciate the general equitable principles which govern the court whenever a receiver is appointed by the court. Most provincial Judicature Acts empower the court to appoint a receiver in those situations where it is just and convenient to do so.⁷

More specific statutory regulation is enunciated in other provincial statutes such as, the Business Corporations legislation and the Personal Property Securities statutes. Part 8 of the Alberta Business Corporations Act⁸ deals with such matters as the function of receivers and managers, the duties and obligations of receivers, and the power which the court may exercise with respect to receivers and the performance of their obligations. The Business Corporations Act applies to those receivers who are appointed either by the court or by the secured creditor to receive (and manage, if that is the case) the property of a corporation. This Act does not apply to the appointment of a receiver to control the property of an individual. In Alberta, the Personal Property Security Act⁹ (hereinafter referred to as P.P.S.A.) which comes into force on October 1, 1990, will apply to receivers of both a corporation's and an individual's property. The P.P.S.A. also specifies the rights and duties of a receiver as well as the powers

which the court may exercise in its jurisdiction over receivers. Each of these Acts will be discussed in greater detail throughout the course of this thesis.

C. Contractual Regulation of Receivers

The process of receivership is often resorted to in a commercial lending situation in order to protect the lender's security. Prior to lending money, the vast majority of lenders will enter into some form of contract or security agreement which sets out the terms and conditions of the loan. Commonly, this contract will contain provisions regarding the appointment and conduct of a receiver in the event of a default. These contractual provisions are very important with respect to regulating the activities of the receiver, however, they must be interpreted in light of the applicable statutory and equitable provisions which also govern receivers within that jurisdiction. In those jurisdictions which have not enacted P.P.S.A. legislation, debenture financing is often used to secure commercial loans to corporations. In P.P.S.A. jurisdictions, however, the contract used to secure such loans is referred to as a security agreement.¹⁰

As security to ensure the repayment of money which it has borrowed, a company often grants a debenture. Although undefined by Canadian or most provincial statutes, "a debenture is generally understood to be an instrument creating or acknowledging a debt of the corporation, whether payable on demand or payable over a period of time."¹¹ A debenture may create a fixed charge over the corporation's assets and often includes a floating charge over all inventory and

property which the corporation owns or may acquire after the execution of the debenture.¹² The "floating charge operates as an immediate and continuing charge on the property charged, subject only to the company's powers to deal with the property in the ordinary course of business."¹³

A debenture, once again, is simply the security instrument which is taken by the lender (which is usually a bank or other financial institution) to ensure that the money which it has lent to a corporation will be repaid. If there is default in repayment or if the terms and conditions of the debenture are breached in a material way the debenture becomes enforceable pursuant to its terms. For the purpose of enforcing the security, debentures commonly provide for the appointment of either a receiver, or of a receiver and manager (also referred to as a receiver/manager or receiver-manager).

It is common for both debentures and P.P.S.A. security agreements to include a contractual provision which deems that the receiver shall be the agent of the debtor corporation, notwithstanding that he was appointed by the debenture holder or secured party. The effect of such contractual deemed agency clauses is, of course, the issue which is central to this thesis.

As a result of the terminology which is employed in other areas of the law, the type of receivership discussed herein, which results from the enforcement of a security instrument, is often confused with other terms and situations. These confusing terms and situations include the concept of bankruptcy and the appointment of an interim receiver

pursuant to the provisions of the Bankruptcy Act, and the remedy of appointing a receiver by way of equitable execution.

D. Receivership Distinguished from Bankruptcy and Equitable Execution

Receivership, as a means to enforce a secured debt, is not the same as bankruptcy. Receivership is a means by which a secured creditor can enforce and attempt to collect upon its own security instrument. Bankruptcy is a statutory programme governed by the federal Bankruptcy Act¹⁴ which creates a scheme of distribution whereby unsecured creditors can share in the assets of the bankrupt and thereby attempt to collect at least a portion of the debt due and owing to them.

There is often a gap in time between the filing of a petition in bankruptcy and the final disposition of the matter by the court. In order to protect the property of the debtor, for the benefit of all of its creditors, pursuant to the Bankruptcy Act, an interim receiver may be appointed during this period of time.¹⁵ An interim receiver under the Bankruptcy Act functions more as a trustee of the bankrupt's estate than as a true receiver who is appointed to take control of and to liquidate the debtors' assets.¹⁶

Receivership, as discussed in this thesis, is not based upon or related in any way to the formal, statutorily regulated scheme of bankruptcy governed by the Bankruptcy Act. Rather, receivership as used herein applies strictly to the equitable, statutory and contractual remedy provided to secured creditors for the purpose of realizing upon their own security instruments.

A receiver appointed by way of equitable execution is also not the focus of this thesis. The distinction between receivership and equitable execution has been summarized by Bennett as follows:¹⁷

The term receiver is also used to describe the remedy known as the appointment of a receiver by way of equitable execution. This type of receiver is appointed by the court following judgment as an ancillary method of collecting a debt. Traditionally, such a receiver had no power to manage, and was generally employed where the creditor could not levy execution at common law.

Thus the appointment of a receiver by way of equitable execution is a remedy which is available to unsecured creditors who have obtained judgment and are attempting to collect that judgment. Equitable execution is not to be confused with the private or court appointment of a receiver on behalf of a secured creditor who holds a valid security instrument.

E. Other Bases for the Appointment of a Receiver

There are many other bases, mainly pursuant to statutory authority, by which a court may appoint a receiver. These include the following:

- The appointment of a receiver of rents in a mortgage foreclosure action.¹⁸
- The appointment of a receiver pursuant to the B.C. Travel Agents Act.¹⁹
- The appointment of a receiver pursuant to the Alberta Securities Act.²⁰

- The appointment of an agent to take possession of the debtor's inventory which has been charged by s. 178 security under the Bank Act.²¹

Except in the case of s. 178 security granted under the Bank Act, it is rare, if at all possible, to appoint one of these receivers privately; most of them must be appointed by the court. The issue concerning whom the receiver is agent of does not arise when considering the status of a court appointed receiver. The central issue of this thesis arises only when considering the status of a privately appointed receiver, that is, a receiver who is appointed solely by the action of the holder of the security instrument without the intervention or sanction of the court. Since it is very common for a debenture to permit the private appointment of a receiver, and since this provision is commonly resorted to this thesis will concentrate on the agency status of a receiver who is appointed privately pursuant to a debenture or other similar security instrument.

ENDNOTES

CHAPTER II

1. R.P. Meagher, W.M.C. Gummow, and J.R.F. Lehane, Equity Doctrines and Remedies (2d ed. 1984), 653.
2. G.W. Keeton and L.A. Sheridan, Equity (2d ed. 1976) 378.
3. P.V. Baker and P.St.J. Langan, Snell's Principles of Equity (28th ed. 1982) 664.
4. F. Bennett, Receiverships (1985), 1.
5. The sloppy use of the term receiver, to include receiver and manager, is used by text writers (see Bennett id.), article writers, the judiciary and by chartered accountants who act as receivers and receiver/managers. See R.E. Lowe, "How to Salvage Business Through Receivership" Handbook on Receiverships, (F. Bennett and J. Berman ed. 1983) 1.
6. Hopkins v. Worcester and Birmingham Canal Proprietors (1868) L.R. 6 Eq. 437 at 446.
7. For example: Judicature Act, S.A. 1989 c. J-1, s.13(2); The Court of Queen's Bench Act, S.M. 1988-89, c.4=Cap. C280, s.55; Judicature Act, R.S.O. 1980 c.223, s.19(1). The application of these equitable principles is discussed further in Chapter III.
8. S.A. 1981 c. B-15, ss. 89-96. Reproduced in Appendix I herein.
9. S.A. 1988, c. P-4.05. Reproduced in Appendix I herein. For date of coming into force, see s. 102. Other Canadian jurisdictions which have already enacted similar personal property security legislation include Ontario, Saskatchewan, and Manitoba. Similar legislation in British Columbia was passed on June 15, 1989 and will come into force by regulation of the Lieutenant Governor in Council.
10. The distinctions between common law type securities are eliminated in these jurisdictions, and all forms of security documents under the P.P.S.A. are known simply as security agreements. P.P.S.A., Alberta, supra n. 9, s. 1.
11. Bennett, supra n. 4 at 58.
12. Roynat Ltd. v. Denis., [1982] 5 W.W.R. 509 at 519 (Sask. C.A.).
13. Gordon MacKay & Co. Ltd. v. Capital Trust Corp. Ltd. [1927] S.C.R. 374 at 385 (S.C.C.).

14. R.S.C. 1985, c. B-3.
15. Id. ss. 28 and 29. Also see A.K. Kemp-Gee, "Insolvency in Practice: A Receiver's View," [1982] L.S.U.C. Spec. Lec. 615 at 632 for a description of the role of an Interim receiver.
16. Note, however, that the term "interim receiver-manager" is a confusing one since it is also used with reference to a receiver appointed in an ordinary receivership situation. It is possible for the court to appoint an interim receiver-manager in a receivership action pending final disposition of the action. Such a receiver may be appointed in an interlocutory application provided that it is just and convenient to grant interim relief. See Canadian Imperial Bank of Commerce v. El Dorado Holdings Ltd., unreported, 14 Oct. 1983, Appeal No. 15672 (Alta. C.A., JJ.A. McDermid, Laycraft, McClung).
17. Bennett, supra n. 4 at 3.
18. In Alberta, pursuant to the Rules of Court, and Law of Property Act R.S.A. 1980, c. L-8, s.45. Also see E. Young, "Receivers in Mortgage Foreclosure Actions" in The Canadian Bar Association, Alberta Branch, Midwinter Meeting 1984, Calgary, Alberta, 105. And see Vancouver City Savings Credit Union v. Miller Electronics Ltd. (1986), 8 B.C.L.R. (2d) 349 (B.C. S.C. Chambers) which discusses a court appointed receiver manager in a mortgage foreclosure action.
19. Travel Agent's Act, R.S.B.C. c.409, s.27.
20. S.A. 1981 c. S-6.1, s. 38. Also see Fort Gary Trust Co. v. Alberta Securities Commission, [1980] 6 W.W.R. 481; 35 C.B.R. (N.S.) 272; 27 A.R. 56 (Alta C.A.), and Re Ontario Securities Commission and Greymac Credit Corporation (1983), 33 C.P.C. 270 (Ont. S.C. D.C.) regarding the appointment of a receiver pursuant to the Securities Act, R.S.O. 1980 c.466, s.17.
21. Bank Act, R.S.C. 1985, c.B-1. See: Re St. Louis Bedding Co. (1982), 42 C.B.R. (N.S.) 75 (Que. Bureau du Commissionnaire du Travail). Security Agreements granted pursuant to s.178 of the Bank Act, normally contain a clause which permits the lender to appoint a receiver. For an example of this, see the standard form agreement which is used by the Bank of Montreal, and which is reproduced in R.J. Wood, Cases and Materials on Secured Transactions, Faculty of Law, University of Alberta, 1988, p. 275. Clause 7 thereof, at p. 276, states that:

The Bank . . . may from time to time appoint a receiver or agent to act for the Customer, for whose acts the Customer alone shall be responsible, and the Customer shall have no power to revoke such appointment or determine such agency.

III. APPOINTMENT OF A RECEIVER

- A. Workout Agreements and Assessment Reviews
- B. Appointment of a Receiver to Enforce Debenture Security
 - 1. Court Appointed Receiver
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 - a. Prerequisites to the Private Appointment of a Receiver
 - i. event of default
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- C. Advantages Associated with Private Appointment
- D. Conversion of a Privately Appointed Receiver to a Court Appointed Receiver
- E. Receivership's Impact on the Board of Directors

III. APPOINTMENT OF A RECEIVER

The ability to appoint a receiver pursuant to a security instrument, such as a debenture, will arise in the event of default by the debtor corporation under the terms of that instrument. When default occurs, the onus is on the debenture holder to decide whether and how to enforce its security. The security may be enforced by appointing a receiver either by way of initiating the appropriate court proceeding to have the receiver appointed by the Court, or by sending the appropriate notice to the corporation appointing the receiver privately in accordance with the contractual terms of the debenture itself.

Prior to the actual appointment of a receiver, it may be advantageous to the lender to have an individual who is independent of

the debtor objectively review the debtor's business operations. This may be done either for the purpose of implementing a financial workout (described infra) or for providing otherwise unknown information to the lender.

A. Workout Agreements and Assessment Reviews

"Lengthy, costly and unproductive receiverships . . . have forced creditors and their debtors to find new and innovative alternatives to the liquidation of a financially troubled business."¹ An example of such a creative alternative, is a financial workout agreement which is:²

reached between a debtor and its creditors designed to revitalize a financially troubled, but still viable business, without resorting to formal judicial proceedings.

For the purpose of implementing such an agreement, a monitor is retained by the security holder "to supervise the activities and operations of the debtor so as to be promptly aware of any significant deterioration in the debtor's financial condition or the value of the creditor's security."³

As an alternative to, or in conjunction with, the implementation of the workout agreement, the creditor may appoint a consultant to conduct an assessment review of the debtor corporation's business. This review enables the debenture holder to better assess the debtor's financial status.

The debenture holder is typically a bank or other financial institution which is not involved with the daily operations of the corporation. Consequently, it is often difficult for the bank to determine the financial stability of the corporation, as well as whether

or not default has occurred under the terms of the debenture. To facilitate this determination, the debenture "may provide for the right of the security holder to appoint a consultant to review the debtor's viability and the realizable value of the property subject to the security instrument."⁴ If the security instrument does not permit the appointment of an independent consultant then the bank may be able to reach an agreement with the debtor for such an appointment.⁵ "Often the debtor, only too aware of his financial difficulties, consents willingly to the assessment."⁶

Typically, a monitoring agreement is a three party agreement between the lender, the debtor and the monitor,⁷ which provides that the monitor is appointed by the lender and that the appointment may be terminated by the monitor or the lender, but may not be terminated by the debtor corporation. A well drafted monitoring agreement specifically states that the function of the monitor is to review the business affairs of the debtor and report to the lender, and that the monitor shall have no managerial responsibilities.

Once appointed, both monitors and consultants must act in an advisory capacity only.⁸

Regardless of the title of the professional appointed, his role must be a passive one. He cannot interfere with management, he cannot prefer one creditor over another and he most certainly cannot manage the operation himself; for to do so is to certainly invite liability not only for himself, but also the person who has engaged or directed him.

In this respect, the monitor or consultant is very different from a receiver-manager. A receiver-manager's mandate is to step in, take

control of and manage the affairs of the debtor corporation. The monitor or consultant, on the other hand, is specifically prohibited from exercising such a managerial function. Clearly, then the purpose of a workout or an assessment review is not to subvert the receivership process. Rather, it is a last ditch effort to avoid a receivership.

The agency status of a monitor or consultant is also different from that of a privately appointed receiver. Pursuant to a clause in the security agreement which governs the actions of the receiver, a privately appointed receiver is typically deemed to be the agent of the debtor corporation. By contrast, "the Monitor shall not hold itself out to be the agent of the Company."⁹ If it becomes necessary to initiate the receivership process following an attempted workout agreement or assessment review, the lender most commonly appoints the monitor or consultant as the receiver. This practice avoids added expense for the lender, since the lender does not have "to pay the receiver for the time necessary to gain a working knowledge of the debtor which is already held"¹⁰ by the monitor or consultant. The practice of subsequently appointing the monitor to be a receiver raises a potential conflict of interest, however, when one considers the agency status of each party. The monitor is acting for and providing information to the lender, whereas the receiver is deemed to be the agent of the debtor corporation. Surely it is a conflict of interest for one individual to gain information and knowledge by acting for one party, the lender, and then to turn around and use the same information and knowledge when acting as the agent of another party, the debtor corporation. A

conflict of interest also arises because the monitor's report, itself, influences the decision of whether or not to appoint a receiver.

Monitoring agreements deal with this conflict by stating that "the Company acknowledges that the appointment of * as Monitor pursuant to the terms of this Agreement shall not be grounds for its objection to the appointment of * as Receiver or Receiver Manager."¹¹ Although a clause such as this removes the conflict of interest issue as a grounds for objecting to the appointment of a receiver, it does not address the fundamental conflict which exists when one person uses information obtained for the benefit of one party, when acting as agent for another party who is opposite in interest to the first.¹²

B. Appointment of a Receiver to Enforce Debenture Security

Provided that the terms of the debenture or other security instrument are not breached, the receivership process will not be invoked. However,¹³

it is common to provide in a security instrument that if the debtor defaults in a payment of principal or interest or if the debtor breaches some other provision, whether a positive or negative covenant, the security under the instrument becomes enforceable as against the debtor.

Upon default under the debenture, it is open to the security holder to take the appropriate steps to enforce its security by the appointment of a receiver. This may be done in either of the following two ways, namely:

1. by court appointment, or
2. by private appointment, by the lender, in accordance with the provisions contained in the security instrument itself.

Since the procedure which must be followed in order to appoint a receiver differs in each of the above situations and since the resulting status and powers of the receiver are dependent upon the method used to appoint him, closer examination of the two means of appointing a receiver is warranted.

1. Court Appointed Receiver

If the security holder determines that a receiver who has been appointed by the court, and therefore one who holds the court's sanction, is desirable under the circumstances, it may commence a court action seeking relief that includes the appointment of a receiver.¹⁴

In such case, the security holder must commence an action, inter alia, for a declaration as to the enforceability of the charge, for judgment, and for foreclosure or sale together with the appointment of a receiver and manager irrespective of whether there is a provision in the security instrument permitting the appointment of a receiver and manager.

In determining whether or not to grant the receivership (i.e. to appoint the receiver) the court is guided by statutory provisions contained in the applicable legislation, such as the Business Corporations Act, the Judicature Act and Personal Property Security legislation.¹⁵ Most provincial Judicature Acts¹⁶ empower the court to appoint a receiver where it appears to the court to be just and convenient to do so.

One factor which the court will take into account in considering whether or not it is just and convenient to appoint a receiver is the relative strength or weakness of the security. "It is just and

convenient to make the appointment where the principal owing under the debenture is in arrears and where the security is in jeopardy."¹⁷ The Saskatchewan Court of Queen's Bench has refused an application to appoint a receiver based on the fact that the security was not in jeopardy.¹⁸ The grounds for appointment of a receiver by the court are not, however, limited or restricted to preservation of the security. The British Columbia Supreme Court held in Re Victoria Mortgage Corporation¹⁹ that such an application will be granted if it is in the best interests of the creditors, in all of the circumstances, that a receiver should be appointed.

When enforcing security instruments most lenders appear to prefer the alternate method of appointing a receiver, that is, a private or instrument appointment, rather than a court appointment.²⁰ The reluctance to appoint a receiver who has the sanction of the court probably results from the disadvantages associated with this method of appointment as perceived by most security holders. These disadvantages include the time delays and expense associated with a court appointed receiver. Time delays occur because²¹

once a court appointment is invoked, the court appointed receiver, the security holder and any person who has a vested interest in the debtor's equity may apply to the court for advice and directions.

The large number of parties who have standing to apply for advice and directions naturally slows down the process of the collection and sale of the debtor corporation's assets, which is the mandate of every receiver.

Further,²²

the action to enforce the security is in itself a delay in the proceeding to collect the debt. The debtor will be given time to redeem and a forum to defend. The receiver will in most cases be required to seek court approval in disposing of the debtor's assets. Each motion to the court affords the debtor more time to attempt to reorganize.

Secondly, a court appointed receivership can be very expensive. The costs of the receiver in preparation of a motion and report to the court are time consuming.

Thus, many lenders prefer to appoint a receiver privately and thereby minimize the delays and expenses associated with a court appointed receiver. Since privately appointed receivers are relatively more common, the determination of whose agent is a privately appointed receiver assumes even greater importance.

2. Privately Appointed Receiver

A privately appointed receiver is appointed by the debenture holder pursuant to the terms of the security agreement between the debtor corporation and the secured creditor. It is not necessary for the debenture holder to apply to the court, or to obtain any court sanction or approval for its actions. As a result of this lack of formal sanction by the court, and as a result of the fact that his appointment arises from the terms of the security instrument, a privately appointed receiver is also referred to as a receiver appointed out of court, or as an instrument appointed receiver. The debenture usually states that in the event of default by the debtor corporation, the security holder may appoint a receiver. There is usually no prescribed form in which the private appointment must occur, however, the debenture usually requires that the appointment be in writing and

that notice thereof be given to the debtor corporation.²³ When this remedy is contractually agreed upon in the security instrument the lender is at liberty to appoint such a receiver pursuant to the instrument, provided that certain prerequisites to the appointment of a private receiver have first been satisfied.

a. Prerequisites to the Private Appointment of a Receiver

The following prerequisites must be met before a receiver can be properly appointed privately:

1. An event of default must have occurred.
2. In some cases, notice of the default must be given to the debtor.
3. If required by the security instrument, a reasonable opportunity must be given to the debtor to rectify the default.
4. A demand for payment must be made.
5. A reasonable time must be given to the debtor to comply with the demand for payment.

Dealing with each of these in turn:

1. Event of Default

If the debtor breaches a term of the security instrument or defaults in the payment of either the principal or interest due pursuant to the agreement, an act of default is said to have occurred with the result that the security becomes enforceable, at the option of the

lender. A significant default is often regarded as a prerequisite to the private appointment of a receiver pursuant to the terms of the security instrument.

ii. Notice of Default

"Where the debtor is in default pursuant to the terms of the security instrument, the security holder may be required under legislation or the instrument to send a notice of default to the debtor prior to being in a legal position to enforce the security."²⁴

iii. Opportunity to Rectify Default

In those situations where notice of default must be given to the debtor corporation, the security holder is also required to provide the debtor with an opportunity to rectify the default.²⁵ If the default is not rectified the security holder is at liberty to take the next step in the receivership process and to demand that payment be made. Although theoretically there should be a gap in time between the notice of default and the demand for payment, "in practice, both the notice of default and demand for payment are given at the same time."²⁶

iv. Demand for Payment

Since "most debentures and security agreements provide that all funds secured thereunder are payable on demand,"²⁷ it is essential for the security holder actually to demand payment of all of the money due and owing to it.²⁸

One of the most fundamental and important rights a debtor has is the right to tender payment of all monies owing to the creditor upon proper notification of a demand for payment.

This notice provides the debtor with the opportunity to retire its indebtedness completely to the security holder by refinancing with another institution or lender. If the amount owing under the security is paid in full, the receivership process ends for the obvious reason that there is no longer any money due and owing under the security agreement. Although the time given to repay the loan is usually very short, it is nonetheless very important since it may well be the last opportunity which the debtor corporation is given to salvage its business.

v. Reasonable Time to Pay

In order to facilitate the debtor's right to obtain refinancing and pay off its indebtedness, the courts have held that the security holder must provide the debtor with a reasonable time in which to pay. If a receiver is appointed privately and if he takes possession of the debtor's goods without the security holder having given the debtor a reasonable time to pay, both the receiver and the security holder will be liable for trespass and conversion of the debtor's property.²⁹

The Supreme Court of Canada considered the reasonable time to pay issue in Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd.³⁰ In this case, the debenture holder, Dunlop Canada Ltd., appointed a receiver under a demand debenture, and without prior notice to the debtor corporation the receiver took possession of the company's premises. Contemporaneously

with taking possession, the receiver delivered a written notice of default under the debenture, together with a demand for payment forthwith. The court held that insufficient time was given to the debtor corporation to comply with the demand for payment, and consequently the seizure of the debtor corporation's property was unlawful.

In reaching this decision, the court relied upon two English decisions arising from the 1860s. The first, Massey v. Sladen³¹ held that the debtor must be given "some notice on which he might reasonably expect to be able to act," and the second case, Toms v. Wilson³² stated:

But, when, by the express terms of the instrument creating the debt, payment is to be made "immediately upon demand in writing," it must be construed to mean within a reasonable time.

By taking possession of the debtor corporation's premises, without first providing a reasonable time for the debtor to comply with the demand for payment, "Dunlop and its agents, its employees and the receiver were guilty of trespass and conversion."³³

The decision in Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd. has been followed in many subsequent decisions dealing with demand debentures.³⁴ The original principle enunciated in Lister v. Dunlop has also been expanded to the case of a term debenture in Roynat Ltd. v. Northern Meat Packers Ltd.³⁵ A demand debenture or demand loan is one which has no fixed payment schedule or predetermined repayment date. As its name suggests, the money due under the loan becomes payable once a demand for payment has been made. A term debenture or term loan, on the other hand, is one which calls for specific payments at specified times.

It typically contains an acceleration clause which provides that if default occurs, the balance owing under the debenture may be accelerated and become immediately due and payable.

In Roynat Ltd. v. Northern Meat Packers Ltd. the holder of a term debenture appointed a receiver to take possession of the debtor corporation's assets. The debtor objected to the seizure of its property on the grounds that no demand or time to pay was given to the debtor corporation prior to the appointment of the receiver. The New Brunswick Court of Appeal held that the reasonable time to pay principle enunciated in Lister v. Dunlop is not restricted to demand debentures, but is applicable to all types of debt situations. Consequently, the court held that³⁶

where no prior notice, let alone reasonable notice, was given to Northern . . . the appointment by Roynat of a receiver and its subsequent seizure and sale of the assets of Northern . . . constituted trespass and conversion for which Roynat is liable in damages.

Since a term debenture calls for specific payments at specific times, it does not seem logical that the concept of giving a reasonable time to pay should be applied to this type of loan agreement. In further support of this criticism, it must be noted that the cases which formed the foundation of the reasonable time to pay concept, (in particular, Toms v. Wilson³⁷) clearly refer to a demand type of loan rather than a term loan. It is submitted, therefore, that the extension of Lister v. Dunlop to term debentures is unwarranted based upon the nature of a term debenture and based upon the cases relied on by the Supreme Court of Canada when it reached its decision in Lister v. Dunlop.

When a debenture holder improperly appoints a receiver by giving the debtor an unreasonably short time to pay, both the receiver and the debenture holder have been held liable to the debtor corporation for trespass and conversion. The basis for such a finding is that the receiver is acting as the agent of the debenture holder. Although many debentures state that the receiver is deemed to be the agent of the debtor corporation, this provision does not come into effect when the receiver has been improperly appointed. When appointing the receiver without giving a reasonable time to pay, the debenture holder is acting beyond the contractual terms contained in the security instrument with the result that the deemed agency clause will not come into effect, and consequently, the receiver will be viewed as the agent of the debenture holder.

C. Advantages Associated with Private Appointment

It is more common to appoint a receiver privately, pursuant to the security instrument, than it is to apply for a court appointed receiver. This is due to the advantages which are commonly associated with the more direct route of private appointment.³⁸

The distinctive advantage of the privately appointed receiver and manager is that the proceedings are more expeditious throughout. A private appointment is a self-help remedy; the security holder need not invoke an action to enforce the security but need only notify the debtor that an appointment has been made after the time when the security became enforceable.

In addition to these advantages, the debenture holder is often restricted by the courts to proceed by way of private appointment rather

than by way of court appointment. Where the debenture in question contains the power to appoint a receiver privately, the courts are reluctant to intervene and appoint a receiver, unless a court appointment is clearly shown to be warranted.³⁹

Since privately appointed receivers are more common than court appointed receivers, it is extremely important to resolve issues such as whose agent is the privately appointed receiver.

D. Conversion of a Privately Appointed Receiver to a Court Appointed Receiver

What happens if a debenture holder who has appointed a receiver privately, subsequently changes its mind and wants the extra protection which is offered by a court appointed receiver? Is it possible to convert a privately appointed receiver to a court appointed receiver?⁴⁰

Often a lender may initially enforce its security by private appointment and then at some later stage seek the appointment of a judicial receiver and manager. The privately appointed receiver may encounter difficulties with utilities, crown liens, prior and subordinate secured creditors and execution creditors. In these circumstances, the court has the discretion to appoint a receiver in a timely fashion. If the lender proceeds within a reasonable time after the privately appointed receiver is appointed the court may appoint a receiver if it is just and equitable; however, the privately appointed receiver will remain liable for his conduct up to the date of the court appointment.

This quote contemplates the debenture holder applying to the court to have an instrument appointed receiver converted into a court appointed receiver. It is also possible, however, for the receiver or any interested party (for example the debtor corporation) to apply to the court to have a privately appointed receiver replaced by a court

appointed receiver. In Alberta, the legislative authority for this may be found in s. 95(a) of the Business Corporations Act,⁴¹ which states as follows:

On an application by a receiver or receiver-manager, whether appointed by the Court or under an instrument, or on an application by any interested person, the Court may make any order it thinks fit including, . . .

(a) an order appointing, replacing or discharging a receiver or receiver-manager and approving his accounts.

The case of First Pacific Credit Union v. Grimwood Sports Inc.⁴² involved a challenge by the debtor corporation, of the privately appointed receiver's ability to continue acting as receiver, in conjunction with a request for the substitution of a court appointed receiver in place of the privately appointed receiver. As stated by the British Columbia Court of Appeal in First Pacific Credit Union v. Grimwood Sports Inc.:⁴³

there would appear to be no assistance from the authorities as to when a receiver-manager appointed under an instrument should be replaced by a court appointed receiver-manager.

Despite the lack of prior guidelines, however, the court in this case did not hesitate to substitute a court appointed receiver for one which had previously been appointed privately.

As stated by the B.C. Court of Appeal, "it is clear that the court has the power to make an appointment which has the effect of removing the contractual receiver-manager,"⁴⁴ however, the court must examine the circumstances of each case to determine if the facts justify the exercise of that power. In First Pacific Credit Union v. Grimwood Sports Inc.,⁴⁵

by the time the matter came before . . . [the chambers judge], there were good grounds for concluding that the contractual receivership should be terminated. It had been in place for almost two years with no end in sight. During that time the business had declined and the level of costs had been high. Those matters provide some basis for apprehension of possible jeopardy to the undertaking, if not the physical assets. More importantly, the receiver-manager and the principals of the company were hopelessly at loggerheads. A situation had developed in which it had become difficult, if not impossible, for the receiver-manager to fulfill properly the trying task of discharging the heavy obligations imposed upon it by the contract and the Company Act.⁴⁶

In further analysing the facts of the case, the court stated that⁴⁷

clearly, a receiver-manager should not be removed simply because a difference of opinion or clash of wills has developed between it and the company. Such conflicts occur in some degree in many, perhaps most, receiverships and must be accepted as a fact of life. But here the circumstances went beyond that and provided a proper basis for concluding that it would be best for all concerned that the court appoint a receiver-manager to preserve the assets for the benefit of all those having an interest in them. The matter is one of discretion. The evidence provided a sufficient basis for it to be exercised.

Based upon this decision of the British Columbia Court of Appeal, one can conclude that a court may exercise its discretion to replace a privately appointed receiver in those situations where the assets of the debtor corporation are in jeopardy, and where the privately appointed receiver is not conducting the receivership in an effective manner.

It is interesting to note that in First Pacific Credit Union v. Grimwood Sports Inc. the court commented upon the type of individual who should replace the privately appointed receiver.

In so doing, the court stressed that the new court appointed receiver⁴⁸

must be impartial, disinterested and able to deal with the rights of all interested parties in a fair and even-handed manner, . . . [and] he ought [also] to appear to have those qualities.

A privately appointed receiver acts as an agent, and most commonly, he is deemed to be the agent of the debtor corporation pursuant to the provisions contained in the debenture. A court appointed receiver, on the other hand is not an agent but rather, is an officer of the court. It is submitted that when a privately appointed receiver is either converted to or replaced by a court appointed receiver, the agency relationship should end. It is submitted that once such a conversion occurs, and the receiver is appointed by the court, he should become an officer of the court and there should be no lingering shadows of an agency relationship between any of the parties.⁴⁹

E. Receivership's Impact on the Board of Directors

The appointment of a receiver, either privately or by the court, has a very significant impact upon the powers of the debtor corporation's board of directors. At common law, as stated in Moss Steamship Co. Ltd. v. Whinney:⁵⁰

this appointment of a receiver and manager over the assets and business of a company does not dissolve or annihilate the company . . . [The company] continue[s] to exist; but it [the receivership] entirely supersedes the company in the conduct of its business, deprives it of all power to enter into contracts in relation to that business, or to sell, pledge, or otherwise dispose of the property put into the possession, or under the control of the receiver and manager. Its powers in these respects are in abeyance.

This concept of holding the powers of the board of directors in abeyance during the course of the receivership has been codified in Alberta by s.91 of the Business Corporations Act,⁵¹ which states:

If a receiver-manager is appointed by the Court or under an instrument, the powers of the directors of the corporation that the receiver-manager is authorized to exercise may not be exercised by the directors until the receiver-manager is discharged.

From these authorities it seems clear that the powers of the board of directors are limited once a receiver is appointed. The full extent of that limitation, however, has been subject to some judicial debate: is the restriction of the powers of the board of directors a total restriction, or merely a partial one? This question seems most often to arise in situations where the receiver fails to commence or pursue legal action which the debtor corporation's board of directors feel should be undertaken.⁵²

The directors ability to commence a breach of contract action against the debenture holder was in issue in Newhart Developments Ltd. v. Co-operative Commercial Bank,⁵³ wherein the receiver objected to an action by the board of directors which was commenced without the receiver's knowledge and consent. The basis of this objection being that the debenture specifically granted to the receiver the power "to take possession of collect and get in the property charged by this debenture and for that purpose to take any proceedings in the name of the Company or otherwise."⁵⁴ The receiver argued that this clause gave him the exclusive power to commence legal actions, with the result that the directors were prohibited from commencing an action against the debenture holders. The English Court of Appeal did not, however, concur

with the argument put forward by the receiver. Rather, the court held that⁵⁵

the provision in the debenture trust deed giving him . . . [the receiver] that power is an enabling provision which invests him with the capacity to bring an action in the name of the company. It does not divest the directors of the company of their power, as a governing body of the company, of instituting proceedings in a situation where so doing does not in any way impinge prejudicially on the position of the debenture holders by threatening or imperilling the assets which are subject to the charge.

Since the breach of contract action which the directors had commenced did not threaten the interest of the receiver or the debenture holder, the court held that it could continue even in the absence of consent on the part of the receiver.

A similar issue subsequently arose in Alberta in Strachan v. MacCosham Administrative Services Ltd.⁵⁶ Following the appointment of a receiver, the directors took steps to continue the debtor corporation under the new Alberta Business Corporations Act.⁵⁷ Having obtained a valid certificate of continuance, the board of directors issued a statement of claim against the debenture holders alleging that the receiver was improperly appointed, contrary to an agreement between the debenture holders and the debtor corporation. The receiver challenged the directors' ability both to continue the corporation and to commence action against the debenture holders.

The Alberta Court of Queen's Bench held in Strachan that "in the absence of evidence of fraud or misrepresentation [the receiver is precluded] from questioning the validity of the certificate"⁵⁸ of continuance. In dealing with the issue of the directors' status to

commence an action against the debenture holders, the court relied upon and interpreted s.91 of the Business Corporations Act (which section is quoted supra). Contrary to the decision in Newhart Developments Ltd. v. Co-operative Commercial Bank⁵⁹ the court held in Strachan that where the debenture empowers the receiver to do certain things, 'those powers become the exclusive jurisdiction of the receiver and can not be exercised by the debtor corporation's board of directors. Pursuant to the judgment of Justice Berger, s.91 of the Business Corporations Act, when⁶⁰

read in conjunction with the powers conferred upon the receiver pursuant to the debentures in the case at bar, excludes directors from taking legal proceedings in the name of the company, whether the receiver-manager has done so or not. The restriction in s.91 . . . is dependent upon examination of the enabling debenture to determine whether the receiver-manager is so authorized. If he is, the power may not be exercised by the directors, notwithstanding that the receiver-manager has not acted.

This restrictive approach taken in Strachan was not subsequently followed by the Alberta Court of Appeal in First Investors Corporation Ltd. v. Prince Royal Inn Ltd.⁶¹ The issue in this case was whether "the directors of a company in receivership . . . have the right, authority and capacity to retain and instruct legal counsel on matters relating to the receivership."⁶² If such a capacity was found to exist, then the directors' solicitors would be entitled to payment from a fund which had been set aside for payment to all unsecured creditors.

The debtor corporation in First Investors Corp. Ltd. had not been continued⁶³ under the new Business Corporation Act, therefore, s.91 thereof (quoted supra) was not applicable. According to Harradence J.A., "the point is not significant, however, since neither [the

Companies Act, R.S.A. 1980, c. C-20, nor the new Business Corporations Act] . . . completely resolves the issue before the court."⁶⁴ Applying the common law principles enunciated in Moss Steamship Co. Ltd. v. Whinney and Newhart Developments Ltd. v. Co-operative Commercial Bank Ltd., the Alberta Court of Appeal held that the appointment of a receiver does not place the powers of the corporation's board of directors completely in abeyance. Following the appointment of a receiver, the board of directors can continue to act provided that they exercise only those powers which do not interfere with the interests of the debenture holder.⁶⁵

In the case at bar, there is no threat to the interests of [the] debenture holders; . . . a fund was made available to allow for debts to unsecured creditors, of which the law firm . . . is one. Thus nothing in the course of these proceedings, including its costs, pose a threat to the interests of the debenture holders. It therefore follows that the duty of the receiver to protect the debenture holders will not be mitigated under these circumstances.

A similar approach to the issue of the effect of a receivership on the powers of the board of directors was enunciated by the Manitoba Court of Appeal in The Bank of Montreal v. Northguard Holdings Ltd.⁶⁶ The court stated that although the appointment of a receiver, who has the authority to commence actions on behalf of the debtor corporation, impliedly divests the directors of such authority, it does not, however, completely remove the directors' power to commence legal actions in the name of the company. The board of directors may validly commence an action which the receiver does not want to bring, provided that "the action is a proper one and injustice may result to some or all of the shareholders of the company if the action is not permitted."⁶⁷

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It is submitted that the less restrictive approach taken in First Investors Corporation Ltd. and The Bank of Montreal v. Northguard Holdings Ltd. is to be preferred over the very restrictive approach taken in Strachan. Both the common law and the wording of section 91 of the Business Corporations Act (quoted supra) support the notion that the powers of the board of directors are not placed completely in abeyance following the appointment of a receiver. If the receiver is the agent of the debtor corporation (as is commonly provided in the deemed agency provision) it also seems logical that the debtor corporation, as principal, should retain some residual powers over its own affairs. In that way the corporation, acting through its board of directors, can monitor the actions of its agent, the receiver, and can take such remedial action as it deems necessary, provided that its actions do not interfere with the contractual rights and interests of the debenture holder.

Armed with knowledge concerning the means of appointing a receiver both privately and by way of a court appointment, as well as the effect of such an appointment on the corporation's board of directors, it is possible to proceed with a discussion of the respective status of each type of receiver; all of which leads closer to the central issue of this thesis, namely, whose agent is the privately appointed receiver?

ENDNOTES

CHAPTER III

1. R. McRae, "Workouts, Restructurings and Reorganizations", Realization and Insolvency, The Continuing Legal Education Society of British Columbia, (Vancouver, April 1986), 1.2.01.
2. Id.
3. Id. at 1.2.02.
4. F. Bennett, Receiverships (1985) 3.
5. Id.
6. A.K. Kemp-Gee, "Insolvency in Practice: A Receiver's View," (1982) L.S.U.C. Spec. Lec. 615 at 619.
7. See for example, the sample monitoring agreement contained in McRae, supra n.1 at Schedule "A", 1.2.37-1.2.41.
8. Id. at 1.2.02.
9. Id. at 1.2.40.
10. D.R. Bailey and L.A. Wong, "Look-Sees," "Give and Take" the Granting of and Realization under Debenture Security, Legal Education Society of Alberta (October 1984) 37.
11. McRae, supra n. 1 at 1.2.40.
12. A detailed discussion and resolution of the conflict of interest issue is beyond the scope of this thesis. For further information see: R. E. Lowe, "How to Salvage Business Through Receivership" Handbook on Receivers, (F. Bennett and J. Bertram ed. 1983) 4 and 5.
13. Bennett, supra n. 4 at 41. Information obtained from an assessment review will assist the lender in determining whether the terms of the debenture have been breached in any way.
14. Id. at 13.
15. Business Corporations Act, S.A. 1981 c. B-15, ss.89-96 (reproduced in Appendix I); Judicature Act, S.A. 1989 c.J-1, s.13(2); Personal Property Security Act, S.A. 1988 P-4.05, s.65 (reproduced in Appendix I).

16. See for example: Judicature Act, id.; Judicature Act, R.S.O. 1980, c. 223, s. 19(1), The Court of Queen's Bench Act, S.M. 1988-89 c.4-Cap. C280, s. 55.
17. Ontario Development Corp. v. Ralph Nicholas Enterprises Ltd. (1985), 57 C.B.R. (N.S.) 186 at 190. (Ont. S.C.).
18. Royal Trust Corp. of Canada v. D.Q. Plaza Holding Ltd. (1984), 54 C.B.R. (N.S.) 18 (Sask Q.B.).
19. (1985), 57 C.B.R. (N.S.) 157 at 165 (B.C. S.C.). "The test is whether in all of the circumstances, in the interests of the creditors, a receiver-manager should be appointed."
20. See Kemp-Gee, supra n. 6 at 1027 where he states:

Although no reliable statistics of the incidence of receiverships are maintained, it would be my guess that less than one in twenty receiverships in Ontario are court-approved.

Also see D. Chilvers and P. Shewell, Receivership Manual (1978) at 3 which indicates that in England, the court appointment of a receiver is rare.

21. Bennett, supra n. 4 at 14.
22. Id.
23. Id. at 15. For a sample letter appointing a private receiver see Kemp-Gee supra n. 6 Appendix "C".
24. Bennett, id. at 74 and 75.
25. Id. at 75.
26. Id.
27. F. Bennett, "Rights and Remedies of a Debtor in a Receivership", Handbook on Receiverships, (F. Bennett and J. Berman ed. 1983), 64.
28. Id.
29. Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd. (1982), 41 C.B.R. (N.S.) 272, 135 D.L.R. (3d) 1 (S.C.C.); Bank of Nova Scotia v. Ham, [1986] 5 W.W.R. 249 (Sask, C.A.).
30. Id.
31. (1868), L.R. 4 Ex. 13 at 19.

32. (1863), 4 B. & S. 442 at 454, 122 E.R. 524 at 529.
33. Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd. supra, n. 29 at D.L.R. 17.
34. For example, see: Mister Broadloom Corporation (1968) Ltd. v. Bank of Montreal (1984), 44 O.R. (2d) 368 (Ont. C.A.); Canadian Imperial Bank of Commerce v. Olympic Hotels Ltd. (1985), 4 C.P.C. (2d) 7 (Ont. S.C. Master); Bank of Nova Scotia v. Ham, supra n. 29.
35. (1986), 29 D.L.R. (4th) 139 (N.B. C.A.).
36. Id. at 143 and 144.
37. Supra, n. 32.
38. Bennett, supra n. 4 at 15.
39. Macotta Company of Canada Ltd. v. Condor Metal Fabricators Ltd. (1979), 35 C.B.R. (N.S.) 144 (Alta. Q.B.); Royal Bank of Canada v. White Cross Properties Ltd. (1984), 53 C.B.R. (N.S.) 96 (Sask. Q.B.); also see Canadian Imperial Bank of Commerce v. El Dorado Holdings, unreported, 14 Oct. 1983, Appeal No. 15672 (Alta. C.A., JJ.A. McDermid, Laycroft, McClung) at 3:

We have ... a debenture holder with a power of private appointment who has come to the Court to receive a Court appointment instead of proceeding on its own. That is something the Court is usually loath to do unless there are exceptional circumstances.

A similar reluctance is implied in Royal Trust Corp. of Canada v. D.Q. Plaza Holdings (1984), 54 C.B.R. (N.S.) 18 at 21 (Sask. Q.B.):

The applicant has failed to show any justification for the appointment of a receiver-manager. There is no evidence whatsoever before the court that such appointment is necessary for the preservation of the assets and if the applicant really wants to appoint a receiver-manager then it can do so without the necessity of an appointment by this court.

40. Bennett, supra n. 27 at 77. As indicated supra n. 39, where the power of private appointment is present in the debenture, the courts are reluctant to appoint a receiver unless such an appointment is clearly shown to be just and convenient.
41. S.A. 1981, c. B-15.

42. (1984), 56 C.B.R. 7 at 10 (B.C. C.A.)
43. Id. at 10.
44. Id. at 18.
45. Id. at 21.
46. The court is referring here to the fiduciary duty which is imposed on receivers in British Columbia pursuant to the Company Act, R.S.B.C. 1979, c. 59, s. 113. This section imposes a fiduciary relationship between the privately appointed receiver and the debtor corporation as if the receiver were a director of the corporation. Note, however, that this section has recently been repealed by Bill 28-1989, Personal Property Security Act, which comes into force by regulation of the Lieutenant Governor in Council.
47. Supra n. 41 at 23.
48. Id.
49. But see: The Clarkson Co. Ltd. v. The Queen (1988), 14-5.88 D.T.C. 6256 at 6262 (Fed. Ct. T.D.), which indicates that notwithstanding his conversion from a privately appointed receiver to a court appointed receiver, the receiver continued to act as the agent of the debtor corporation.
50. [1912] A.C. 254 at 263. Applied in RASL Ventures Ltd. (1987), 17 C.L.R.B.R. (N.S.) 1 at 14 (B.C.L.R.B.).
51. Supra n. 41.
52. For a detailed analysis of the effect of the appointment of a receiver on the powers of the corporation's board of directors, see: Michael Wylie, "Obscurity in Corporate Receiverships: The Ability of a Board to Initiate Legal Proceedings," which has been accepted for publication by the Banking and Finance Law Review, but which has not yet been published.
53. [1978] 2 All E.R. 896 (Eng. C.A.). A more detailed analysis and discussion of this case is found infra in Chapter VI B.8.
54. Id. at 898.
55. Id. at 900.
56. (1986), 46 Alta. L.R. (2d) 146 (Alta. Q.B.).

57. In Alberta, a new Business Corporations Act, supra n. 41, was introduced in 1981, which provided that within a specified period of time, all companies which had been incorporated pursuant to the provisions of the "old" Act, R.S.A. 1980, c. C-20, had to be continued under the new Act, failing which, the corporation was dissolved.
58. Supra. n. 56 at 149.
59. Supra n. 53.
60. Id. at 150, 151.
61. (1988), 69 C.B.R. 50 (Alta. C.A.).
62. Id. at 51.
63. See supra n. 57.
64. Supra. n. 61 at 52.
65. Id. at 55.
66. Unreported, 26 April 1989, Nos. 447/88, 449/88, 36/89, 121/89, 122/89, (Man. C.A., Monnin C.J.M., Huband and Twaddle JJ.A.).
67. Id. at 12.

IV. STATUS, POWERS, DUTIES, AND LIABILITIES OF THE RECEIVER

A. Court Appointed Receiver

1. Status
2. Powers
3. Duties
4. Liabilities

B. Privately Appointed Receiver

1. Status
2. Powers
3. Duties
 - a. Receivership Relationships in the Absence of a Deemed Agency Clause
 - b. Receivership Relationships When a Deemed Agency Clause is Present
4. Liabilities

IV. STATUS, POWERS, DUTIES, AND LIABILITIES OF THE RECEIVER

The authority of the receiver is derived from the method of his appointment. A court appointed receiver has the status of an officer of the court, whereas a privately appointed receiver has the status of an agent. The controversial question which remains unanswered is, an agent of whom?

A. Court Appointed Receiver

1. Status

A court appointed receiver is generally accepted to be an officer of the court who does not have any status as an agent of either party.¹

As stated by the Privy Council in Parsons v. Sovereign Bank of Canada:²

A receiver and manager appointed [by the court] . . . is the agent neither of the debenture holders, whose credit he cannot pledge, nor of the company, which cannot control him. He is an officer of the Court put in to discharge certain duties perceived by the order appointing him; duties which . . . extend to the continuation and management of the business. The company remains in existence but it has lost its title to control its assets and affairs.

2. Powers

The receiver's powers include only those which are specifically conferred by the court order appointing him,³ and as an officer of the court, he is subject to the supervision of the court to ensure that his obligations are discharged properly.⁴ The powers contained in the order appointing the receiver "may not necessarily coincide with those set out in the [security] instrument . . . [however] the authority of the court appointed receiver when acting vis-a-vis the debtor and third parties is restricted to the powers set out in the order."⁵ It is common for the court order to appoint both a receiver and manager whose powers usually⁶

include the power to take possession (of the assets, property and undertaking or specific portions thereof) and the power to instigate legal proceedings for the purpose of protecting those assets . . . [as well as] powers allowing the receiver to carry on the debtor's business . . . to sell, lease or mortgage the assets . . .; and to settle or compromise any debts owing to the debtor corporation.

As discussed in Chapter III.E. supra, the powers which are granted to the receiver are removed from those which the debtor corporation's board of directors can exercise. The receiver's powers are, however, limited to the specific purpose of conducting the receivership in question.⁷

The powers of the board of directors of . . . [the debtor corporation] to manage the affairs of the corporation are held for the time being by the receiver and manager. Included in those powers . . . is the power to waive any solicitor-and-client privilege of the corporation. But that power of waiver, like the other powers of the board of directors held by the receiver and manager, can be exercised by the receiver and manager only for the purposes for which it was appointed. Thus, the receiver and manager . . . can waive the privilege to obtain information regarding the assets and affairs of the company from a solicitor or former solicitor of the company.

3. Duties

A number of relationships arise once a receiver is appointed. The obligations or duties which the receiver holds in each relationship is dependent upon the receiver's status, which in turn is determined by his method of appointment. Upon the appointment of a receiver, the following relationships are apparent:

1. between the receiver and the secured party;
2. between the receiver and the debtor corporation;
3. between the receiver and the remaining creditors of the debtor corporation; and
4. between the receiver and the guarantors of the debtor corporation's debt obligations.

Since a court appointed receiver functions as an officer of the court, the relationship which the receiver has with all of the above-listed parties is fiduciary in nature. As an officer of the court, the court appointed receiver stands in a special position of trust with respect to all of the parties that are connected with the debtor

corporation and the receivership in question. As stated by Mr. Justice Stark in Ostrander v. Niagara Helicopters Ltd.:⁸

A very clear distinction must be drawn between the duties and obligations of a receiver-manager . . . appointed by virtue of the contractual clauses of a mortgage deed [i.e. a privately appointed receiver] and obligations of a receiver-manager who is appointed by the Court and whose sole authority is derived from that Court appointment and from the directions given him by the Court. In the latter case he is an officer of the Court; is very definitely in a fiduciary capacity to all parties involved in the contest [emphasis added].

Thus, a court appointed receiver, as an officer of the court, owes equal fiduciary duties to the debtor, to the secured creditor who petitioned for his appointment, and to the debtor's unsecured creditors.⁹

Although the court order confers upon the receiver the authority or power to act, it does not usually dictate "the general conduct and responsibility of the receiver and manager in carrying out the powers entrusted to him."¹⁰ In order to determine the nature of these duties, one must look to legislation in the area as well as to the common law. In Alberta, the duties which are imposed upon the receiver by statute are enumerated primarily in the Business Corporations Act and in the Personal Property Security Act, the relevant portions of which are reproduced herein in Appendix I. At common law, the court appointed receiver is under a duty to act with such "reasonable care, supervision and control as an ordinary man would give to the business were it his own,"¹¹ and in Alberta, the Personal Property Security Act, which is to come into force on October 1, 1990, provides the following guidelines for the proper exercise of the receiver's rights, duties, and obligations:¹²

s.66(1) All rights, duties or obligations arising under a security agreement under this Act or under any other applicable law shall be exercised or discharged in good faith and in a commercially reasonable manner.

These general principles of good faith and reasonable care are applied when the receiver seeks court approval for his actions. In the case of Toronto Dominion Bank v. Agriborealis Ltd.¹³ the receiver requested an order approving the sale of the debtor corporation's land. The court held that the receiver must obtain the best price from the point of view of the debtor, its shareholders, and guarantors. Other creditors of the debtor corporation were not included in this list because their rights were adequately protected and would not be adversely affected by the sale. Thus it would appear that a court appointed receiver manager owes fiduciary duties to all parties which are connected with the receivership, and he must exercise those duties with good faith and in a commercially reasonable manner.

4. Liabilities

As stated supra, a court appointed receiver does not act as an agent. Rather, he is an officer of the court, and is answerable to the court. A court appointed receiver is in effect a principal, and as such should be responsible for his own actions. Although the court supervises the actions of the court appointed receiver, the receiver, himself, is liable for his own conduct.

Mr. Justice Forsyth of the Alberta Court of Queen's Bench, has summarized the liability of a court appointed receiver as follows:¹⁴

Receivers are generally held personally liable for trade debts incurred during management of the business while they are not personally liable for funds which they have been authorized to borrow during the conduct of the business . . .

[Court appointed] receivers can be held personally liable for day-to-day transactions incidental to the operation of the financially troubled business.

In Greenwood Forest Products (1969) Ltd. v. Newnes Machine Ltd.¹⁵

a court order authorized the receiver to prosecute all legal actions necessary for the protection of the debtor corporation's property. Following his appointment, the receiver assumed the conduct of an action which the debtor had commenced. After a lengthy trial, this action was dismissed, and the receiver, as the plaintiff in this action, was held to be personally liable for the costs of the action.

These findings of personal liability on the part of a court appointed receiver are consistent with the notion that the court appointed receiver acts as a principal, and other than the fact that he must seek court approval for the bulk of his actions, he is, and should be, liable for his own conduct and decisions. By way of contrast, if a privately appointed receiver is indeed an agent, then his principal (whomever that may be) should be liable for the actions of the privately appointed receiver. This topic is discussed further, infra.

B. Privately Appointed Receiver

1. Status

Unlike the court appointed receiver, the privately appointed receiver does not act as an officer of the court. Rather, a privately appointed receiver acts as an agent. The determination of whose agent

he is, is initially answered by reviewing the security instrument pursuant to which he was appointed, together with any statutory provisions which may dictate the agency status of the receiver.

Channel Airways Ltd. v. Manchester Corp.¹⁶ dealt with the receivership of a corporation which was in the air transportation business. Statutes regulating airlines and air transportation matters required that a valid operator's certificate and air service licence be held by the operator of commercial aircraft. A receiver manager was privately appointed to assume the business of the debtor corporation. The receiver's status as agent was in issue in a subsequent dispute regarding the non-payment of airport dues.

The court held that it was the debtor corporation who held the certificates and licences required and not the receiver. Consequently, the court concluded that the receiver must be acting as the agent of the debtor corporation.¹⁷

Unless he was managing the company as the company's agent, . . . [the receiver] would have been acting illegally in carrying on the air transport undertaking and . . . therefore, the company remained throughout the operator of this and its other aircraft.

Thus, in this case legislative enactments were determinative of the receiver's agency status.

In most cases, however, the identity of the receiver's principal is determined by reference to the terms of the security agreement. If the debenture is silent on the issue of whom the receiver is agent of, the common law states that the receiver is the agent of the debenture holder,¹⁸ and that the debenture holder is therefore liable for the acts

of the receiver.¹⁹ Most debentures do not, however, leave the agency position of the receiver open to such implication. Commonly the debenture expressly states that the receiver is the agent of the debtor.

Debentures typically contain a clause such as the following, which deems the receiver to be an agent of the debtor corporation:²⁰

A receiver appointed under the security instrument shall be deemed to be the debtor's agent and it shall be solely responsible for his acts, defaults and remuneration.

Based on such a deemed agency clause, one could assume that in a typical receivership situation, the receiver is the agent of the debtor corporation and that the debtor corporation is therefore the receiver's principal. Any other party would be outside of this agency relationship and should not in any way be able to influence the relationship between the receiver and the debtor corporation. This is not necessarily the case, however, because the agency relationship which exists between the receiver (as agent) and debtor company (as principal) is not a typical one. When consideration is given to the duties and obligations of the privately appointed receiver it is possible to argue that he is in fact acting as the agent of the security holder rather than as the agent of the company as the debenture would seem to indicate.

Although most debentures clearly state that the receiver is deemed to be the agent of the debtor, when one carefully examines the intertwining relationships which exist between the receiver, the debtor and the debenture holder, it is not at all clear whether the receiver is the agent of the debtor corporation or of the secured creditor who appointed him, or both. One matter which does appear to be clear when discussing this agency issue is that the privately appointed receiver is

not an agent of the other creditors, either secured or unsecured, of the debtor corporation.

2. Powers

The powers of a privately appointed receiver "are contained in the security instrument or loan agreement held by the secured creditor. In the typical floating charge debenture . . . these powers are broad and all-encompassing."²¹ It must be remembered that each security instrument is a contractual agreement made between the lender and the corporate borrower and that each agreement is unique. Thus it is necessary to examine each security instrument in order to determine which powers it confers upon the receiver. The receiver appointed under the agreement must be careful not to exceed the specific powers granted to him by the terms of that agreement.

Although unique, security instruments typically provide that:²²

Upon default in payment of the debt or in default of the performance of an obligation, the security holder shall have the power to dispose of the debtor's assets in order to satisfy the obligations incurred.

This power of sale is normally delegated to the receiver,²³ along with the power to commence and defend actions, borrow money, sell and charge assets and discontinue the business.²⁴ Other powers which are normally granted to the receiver in a typical debenture include the power to:²⁵

- a. collect the property charged, which carries with it an implied power to sue in the company's name;
- b. carry on business, which power is normally construed broadly;

- c. borrow; either stated expressly as a separate power or annexed to the power to carry on business, or alternatively a power to borrow a reasonable amount may be implied where the company is a trading or commercial undertaking;
- d. sell the company's property;
- e. employ agents;
- f. repair and insure;
- g. retain documents of title;
- h. contract; and
- i. make compromises and arrangements.

To determine what are the powers of a privately appointed receiver, therefore, it is necessary to review the security instrument pursuant to which he was appointed. It is also essential, however, to examine the powers which were originally granted to the board of directors at the time of incorporation of the debtor company. If the directors do not have a power which the debenture subsequently purports to grant to the receiver, such a power is ultra vires and cannot be exercised by the privately appointed receiver.²⁶

The manner in which these powers are to be executed is determined by the various duties which are imposed upon the privately appointed receiver.

3. Duties

A privately appointed receiver is an agent. He is not an officer of the court. As an agent, the duties of the privately appointed receiver are more limited in scope than the onerous fiduciary duties

which are imposed upon a court appointed receiver. As a result of this difference in status between the privately appointed and court appointed receiver, it is essential to reexamine the relationships which arise in a receivership situation.

As discussed in the section supra dealing with the duties of a court appointed receiver, relationships between the receiver and various other parties connected with the debtor corporation arise once the receiver is appointed. Since the obligations and duties of the receiver in these relationships differ depending upon his method of appointment, it is necessary to examine the relationship which exists between the privately appointed receiver and the:

- secured party;
- debtor corporation;
- other creditors of the debtor corporation; and
- guarantors of the debtor corporation's debt obligations.

Since the privately appointed receiver is an agent, the relationship which he has with each of the above noted parties should be determined with reference to principles of agency law.²⁷ In this relationship, the principal directs the agent as to what is to be done on the principal's behalf. The agent in turn carries out those instructions, and in so doing, acts in a fiduciary capacity towards the principal. In an agency relationship, only the principal is entitled to give instructions to the agent, and anyone who is outside of that relationship between the principal and agent is referred to as a third party. A third party to the principal-agent relationship should not be

able to influence the actions of the agent in any way. How then, do these rules apply in a receivership setting?

In order to analyze the various receivership relationships in agency terms one must first determine what, if anything, the security instrument says regarding the agency status of the privately appointed receiver. If the debenture is silent on this issue, then at common law the receiver is seen to be acting as the agent of the secured party. It is more common, however, for the security instrument to contain a deemed agency clause which deems the receiver to be the agent of the debtor corporation. The receiver, as agent, should of course owe his primary duties and obligations to his principal.

a. Receivership Relationships in the Absence of a Deemed Agency Clause

In the absence of a deemed agency clause, the secured party is the receiver's principal. Thus, the receiver's primary responsibility should be towards the secured party. Since the debtor, other creditors and guarantors are third parties, the receiver's duties towards them should be minimal. It is submitted that in the absence of a deemed agency clause, the receiver should owe only minimal duties to all parties other than his principal, the security holder. Where there are funds remaining in the hands of the receiver after the corporation's debt to the security holder have been paid in full, it is appropriate for the receiver to act as the trustee of any excess funds which remain for division between the other creditors and the debtor corporation.

b. Receivership Relationships When a Deemed Agency Clause is Present

When the security instrument pursuant to which the receiver is appointed contains a deemed agency clause, the debtor corporation is deemed to be the receiver's principal. Thus, the receiver's primary responsibility should be towards the debtor corporation. In the presence of a deemed agency clause, the secured party, other creditors and guarantors must all be classified as third parties who should not in any way be able to influence the actions of the receiver. Once again, the receiver's duties towards these third parties should be minimal. It is submitted that since the debtor corporation itself owes certain duties towards the secured party, other creditors and guarantors, in particular the obligation to reduce its indebtedness, the receiver should have a similar secondary obligation towards these third parties. His primary duty, however, according to principles of agency law must be towards his deemed principal, the debtor corporation. It is further submitted that in order to be consistent with rules of agency law, third parties, including the secured party, other creditors and guarantors, should not have the ability to exercise control over or influence the actions of the receiver.

How, then, does this analysis of the receivership relationships which exist both in the presence and in the absence of a deemed agency clause correspond with reality? Since a privately appointed receiver in

most cases is deemed to be the agent of the debtor company, it seems logical that he would owe duties primarily to his principal, the debtor corporation, in the execution of his powers. This does not, however, appear to be the case. As explained by Frank Bennett in his text Receiverships:²⁸

The primary duty of the privately appointed receiver and manager is to take possession of the property and to account to the mortgagee, debenture holder or secured party at whose instance he was appointed. As in a principal-agency relationship, the receiver is entrusted as a fiduciary with enumerated powers and he is to account to the holder for all sums received and paid out.

With respect to the debtor and execution creditors, the receiver has no fiduciary duty except that he may become a trustee for surplus money realized over and above that which is owing to the security holder and to that extent, he will have a duty to turn over such moneys. He will also have a duty to account to the debtor for what he has taken into possession, sold and applied to the secured debt [emphasis added].

If, as indicated in this quotation, the receiver owes his primary duty to the debenture holder who appointed him, this implies that the receiver should properly be considered to be the agent of the creditor rather than the agent of the debtor corporation (as indicated by the standard deemed agency clause).

As stated by the Ontario High Court in Royal Bank of Canada v. First Pioneer Investments Ltd.,²⁹

the duty of the privately appointed receiver-manager is to protect the security. He must act in accordance with the terms of the security agreement under which he has been appointed. He must act without any ulterior interest, ensure that a fair sale is conducted and that a proper accounting is ultimately made to the debtor.

Although this case hints at the issue of whose agent is the receiver, it does not address the issue directly. According to the quotation

excerpted above, a privately appointed receiver has a duty to protect the security and to act in accordance with the terms of the security agreement. Does this obligation impose upon him a duty to protect the debenture holder's interest and perhaps act as an agent of the debenture holder, or does it mean that pursuant to the terms of the debenture the debtor corporation itself owes these duties to the debenture holder, and that the receiver is now assuming the duties as agent of the debtor?

It must be noted that Royal Bank of Canada v. First Pioneer Investments Ltd. is silent regarding the presence or absence of a deemed agency clause in the debenture. As a result of this silence and the ambiguous implications regarding the receiver's status which are discussed above, the Royal Bank of Canada case does not clearly identify the duties of the privately appointed receiver, nor does it resolve the difficult issue of whose agent is the privately appointed receiver.

The apparent contradiction between receivership law and agency law will be the subject of further analysis in this thesis. Notwithstanding the controversy regarding the issue of to whom the privately appointed receiver owes his primary duty, it seems clear that the scope of the privately appointed receiver's duty is narrower than the scope of the court appointed receiver's duty.

Specific duties are imposed on the privately appointed receiver both by the terms of the security agreement itself and by the various legislative enactments which govern the actions of receivers.³⁰ Statutory duties include the obligation to maintain records, prepare financial statements, open bank accounts, and to comply with the demands

of specified individuals for the provision of financial statements and records.³¹

A privately appointed receiver is under no obligation to obtain court approval for the accounts which he has maintained during the course of the receivership. If the debtor corporation is dissatisfied with the receiver's accounts, however, the debtor may commence an action against the receiver for an accounting. In this indirect fashion, the court can oversee the accounts of the private receiver.³² In the absence of fraud or mala fides, however, the debtor corporation cannot complain about the receiver's actions.³³

4. Liabilities

The personal liability of the privately appointed receiver is closely connected with the receiver's status as an agent. According to principles of agency law, provided that the agent is acting within the limits of the powers assigned to him, the agent will not be personally liable. Rather, in this situation, the principal will be responsible for the actions of its agent.³⁴ Because of this, cases which discuss who is liable for the actions of the privately appointed receiver provide guidance on the issue of who is acting as the principal of the privately appointed receiver. These cases are analyzed in detail in Chapter VI infra for the purpose of answering the question which is central to this thesis, namely: whose agent is the privately appointed receiver. However, in order to effectively discuss the issue of whose agent is the privately appointed receiver, it is first necessary to

examine briefly the law of agency and in particular, how agency law relates to a receivership situation.

ENDNOTES

CHAPTER IV

1. Many cases support the position of the court appointed receiver as an officer of the court. For example, see: Ostrander v. Niagara Helicopters Ltd. (1973), 1 O.R. (2d) 281 at 286, (see infra at n. 8.) which was followed in Royal Bank of Canada v. Vista Homes Ltd. (1984), 54 C.B.R. (N.S.) 124 (B.C.S.C.) and see Moss Steamship Company Limited v. Whinney, [1912] A.C. 254 at 266 (H.L.).

Re: Mr. Greenjeans Corp.; Silver v. Kalen (1984), 52 C.B.R. (N.S.) 320 (Ont. H.C.). A court appointed receiver manager is an officer of the court and therefore is not subject to cross examination on a report which has been submitted to the court pursuant to a court order.

Yorkshire Trust Co. v. Ashcraft Arms Apartment Ltd. (1984), 54 C.B.R. (N.S.) 1 (B.C.S.C.). A court appointed receiver is an officer of the court, and not an agent of the person petitioning for his appointment. Pursuant to the Company Act, R.S.B.C. 1979, c. 59, s 111: "Every receiver-manager appointed by the court is an officer of the court and not of the corporation, and he shall act in accordance with the directions of the court."

Bottoms v. Pacific Northwest Lumber Co., [1929] 4 D.L.R. 415 at 416 (B.C.S.C.). A court appointed receiver is not the agent of any party but is an officer of the court, consequently, "the plaintiff [who secured the appointment of the receiver] could not be held liable for the acts of the receiver unless he could control those acts. But the possession of the receiver being the possession of the Court, cannot be interfered with or disturbed without the leave of the court."

But see P. Vaartnou, Corporate Receiverships -- The Effect of a Court Appointment. Thesis submitted for Degree of Master of Laws in the University of Toronto, 1985, pp. 43-63, wherein he argues that the meaning of the phrase "officer of the Court" is not clear or well defined, and that the court appointed receiver may in fact be an agent of either the secured creditor or the corporate debtor.

In some jurisdictions, the receiver's status as an officer of the court is also confirmed by legislation. For example, see: British Columbia Company Act, supra.

2. [1913] A.C. 160 at 167 (P.C.).
3. Vista Homes Ltd. v. Taplow Financial Ltd. (1985), 56 C.B.R. (N.S.) 225, 64 B.C.L.R. 291 (B.C.S.C. Chambers).

The court appointed receiver-manager is not the general agent or alter ego of the alleged debtor. His powers extend only to those conferred by the order appointing him. They do not extend to a general right to sell property owned by the alleged debtor (C.B.R. at 228).

Where a power of sale is not granted by the order appointing the receiver a subsequent order is required to enable the receiver "to list the property, assets and undertaking charged by the debenture for sale." Royal Bank of Canada v. Astor Hotel Ltd. (1986), 70 B.C.L.R. (2d) 77 at 80 (B.C.C.A.).

However, the courts will interpret some powers broadly. See Re Russell & Dumoulin (1986), 9 B.C.L.R. (2d) 265 (B.C. S.C. Chambers) which held that the power

to enter into possession of all of the property of the Company and to manage the business affairs of the Company . . . [is] sufficiently broad to cover taxation of solicitors' accounts rendered to the debtor corporation.

4. Salima Investments Ltd. v. Bank of Montreal (1985), 59 C.B.R. (N.S.) 242, 21 D.L.R. (4th) 473, 65 A.R. 372, 41 Alta. L.R. (2d) 58 (Alta. C.A.). The proper exercise of judicial discretion when approving a sales agreement made by the court appointed receiver involves "an inquiry [as to] whether the receiver has made a sufficient effort to get the best price and not acted improvidently" (C.B.R. at 245).
5. F. Bennett, Receiverships (1985) 17.
6. A.K. Kemp-Gee, "Insolvency in Practice: A Receiver's View," (1982) L.S.U.C. Spec. Lec. 615 at 625-626.
7. Re Ontario Securities Commission & Greymac Credit Corporation (1983), 33 C.P.C. 270 (Ont S.C. D.C.).
8. Supra n. 1 at 286. This quotation is more completely reproduced infra, Chapter VI. A.1.
9. See: Simpson v. Ottawa (1860) 1 Chy. Chrs. 99 and Brown v. Perry (1865), 1 Chy. Chrs. 253: a court appointed receiver acts for the benefit of all parties and is the trustee for all parties. Fotti v. 777 Management Inc., [1981] 5 W.W.R. 48 (Man. Q.B.): a court appointed receiver appointed under a debenture is an officer of the court. "Clothed as he is with the mantle of this court, his duties are to be approached not as the mere agent of the debenture holder, but as trustee for all parties interested in the fund."

Bank of Nova Scotia v. Vista Homes Ltd. (1984), 54 C.B.R. (N.S.) 124 (B.C.S.C.): a court appointed receiver is under a fiduciary duty to disclose information to, and to communicate with all interested parties, not merely the debenture holder which applied for his appointment.

Kemp-Gee, supra n. 6 at 625 states that

although he has no contractual obligations to a specific creditor, it has become normal practice for a receiver to ensure that the major creditors are kept informed, at least informally, in addition to any written reports the receiver files with the court.

10. Bennett, supra n. 5 at 117.
11. Plisson v. Duncan (1905), 36 S.C.R. 647 at 652 (S.C.C.).
12. Personal Property Security Act, S.A. 1988, c. P-4.05.

Note that the Business Corporations Act, S.A. 1981, c. B-15, s.94 imposes on a privately appointed receiver the duty to act honestly and in good faith and to deal with the corporation's property in a commercially reasonable manner. This section does not, however, apply to a court appointed receiver.

Similarly, pursuant to the B.C. Companies Act. supra n. 1, s.142, the receiver must act honestly and in good faith and in the best interests of the company. He must also exercise the care, diligence and skill of a reasonably prudent person. This section applies only to a privately appointed receiver and not to a court appointed receiver.

13. (1988), 68 C.B.R. (N.S.) 313 (N.W.T. S.C.).

Also see: Royal Bank of Canada v. Vista Homes Ltd. (1985), 58 C.B.R. (N.S.) 144 (B.C. S.C.).

As an officer of the court, a receiver must act fairly and properly and have regard to the rights and interests of all parties concerned. To pay out funds to a litigant before the rights of all the parties were settled would destroy the appearance of fairness and impartiality.

Seattle-First Holding Co. Inc. v. Western Crane Services Ltd. (1987), 56 Alta. L.R. (2d) 39 at 41 (Alta. Q.B.). "A receiver has the duty to act in good faith and to use reasonable care to obtain the true market value of the secured property at the time it is sold."

- Continental Bank of Canada v. Snow (1987), 77 N.S.R. (2d) 208 (N.S.S.C. T.D.).
14. Re Ashk Development Corporation Ltd. (1988), 61 Alta. L.R. (2d) 375 at 380 (Alta. Q.B.). It is submitted that Mr. Justice Forsyth's statements should be restricted to a court appointed receiver because:
 1. the case itself considers the liability of a court appointed receiver; and
 2. he relies upon statements from Kerr on Receivers which are clearly limited to a court appointed receiver.
 15. (1986), 8 B.C.L.R. (2d) 340 (B.C. S.C. Chambers).
 16. [1974] Lloyds L.R. 456 (Eng. Q.B.).
 17. Id. at 459.
 18. In re Vimbos, Ltd., [1900] 1 Ch. 470 at 473 (Ch.).
 19. Robinson Printing Company Ltd. v. Chic. Ltd. [1905] 2 Ch. 123 (Ch.); Deyes v. Wood, [1911] 1 K.B. 806 (C.A.).
 20. Bennett supra n. 5 at 20.
 21. Kemp-Gee, supra n. 6 at 628. Also see Gaskell v. Gosling, [1896] 1 Q.B. 669 at 692 (Eng. C.A.): The powers which the receiver is to have are detailed in the deed.
 22. Bennett supra n. 5 at 116.
 23. Id.
 24. W. Grimble, "Appointment, Duties and Powers of Receivers Under Debentures," (1974) Pitblato Lect. 73 at 73.
 25. J. O'Donovan, "The Powers of a Receiver and Manager Appointed Out of Court", 10 U.Q.L.J. 239 at 239-246. Also see R.J. Turton "Floating Charges and the Appointments and Administration of Receivers and Managers in the U.K." (1982), 87 Com. L.J. 95; and Bennett supra n. 5 at 18 and 121-134.
 26. Re Emmadart Ltd., [1979] 1 All E.R. 599 (Eng. Ch.D.).
 27. Principles of agency law will be discussed in greater depth infra, Chapter V.
 28. Bennett, supra n. 5 at 119.

29. (1979), 106 D.L.R. (3d) 330 at 333 (Ont. H.C., Parker, A.C.J.H.C.); affd. 39 C.B.R. (N.S.) 147 (Ont. C.A.); reversed in part (1984), 52 C.B.R. (N.S.) 225 (S.C.C.). Note that the Ontario C.A. and the S.C.C. accept the trial judge's findings of no fraud or improper dealing on the part of the receiver, and do not comment further regarding the duty or agency status of the privately appointed receiver.
30. Business Corporations Act, supra n. 12, s. 93.
31. See Business Corporations Act s. 96 and Personal Property Security Act s. 65(2)(3)(4) & (5), supra n. 12. (Reproduced in Appendix I.) Henry Weiner Ltd. v. Royal Bank of Canada (1986), 6 P.P.S.A.C. 245 at 247 (Ont. S.C.). Pursuant to s. 20 of the Ontario Personal Property Security Act, the receiver must provide a statement of indebtedness to the debtor or a person interested in the collateral. Although there is no obligation to provide such a statement to an unsecured creditor, the court held that a petitioner in bankruptcy falls within the definition contained in s. 20. Therefore, a statement of indebtedness must be provided to the petitioner in bankruptcy.
32. First Pacific Credit Union v. Grimwood Sports Inc. (1987), 21 B.C.L.R. (2d) 63 at 67 (B.C. S.C.).

Business Corporations Act supra n. 12, s.s. 93 and 95 also gives jurisdiction to the court to supervise a privately appointed receiver. See B. Leonard "Case Comment: Judicial Supervision of Private Receiverships" (1983), 1 Nat. Insolvency Rev. 4.
33. R.P. Meagher, W.M.C. Gummow and J.R.F. Lehane Equity Doctrines & Remedies (2d ed. 1984) 669. Also see Modern Construction Ltd. v. Blakeny (1986), 73 N.B.R. (2d) 1 at 66 (N.B.Q.B.), which held that the receiver

commits no breach of duty to the company by a bona fide sale, even though he might have obtained a higher price and even though from the point of view of the company, as distinct from the debenture-holders, the terms might be regarded as disadvantageous.
34. B.S. Markesinis, An Outline of the Law of Agency (2d ed. 1986) 153.

In England, the privately appointed receiver was made personally liable for his actions by legislation enacted in 1948, however, in British Columbia, the reverse is true. Section 112 of the B.C. Companies Act protects receivers from personal liability if they disclose that they are acting in that capacity: RASL Ventures Ltd. (1987), 17 C.L.R.B.R. (N.S.) 1 at 15 (B.C.L.R.B.). Also see: Matsushita Electric of Canada Ltd. v. Central Trust Co. (1986), 73

N.S.R. (2d) 250 (N.S.S.C. T.D.) and Sugar v. Peat Marwick Ltd. (1988), 55 D.L.R. (4th) 230 (Ont. H.C.) which are concerned with potentially tortious acts on the part of the receiver, namely, inducing breach of contract and negligent misrepresentation, respectively. Neither case finds that the alledged tortious acts in fact occurred, and thus they are not helpful in determining under what circumstances will the privately appointed receiver be held liable for tortious actions.

V. AGENCY LAW

- A. Terminology
- B. Appointment and Authority of the Agent
 - 1. Appointment by Contract
 - 2. Actual Authority — Express and Implied
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 - 4. Extension of the Agent's Authority by Ratification
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 - a. Prerequisites for Agency by Estoppel

V. AGENCY LAW

In order to answer the question which is posed by this thesis, namely whose agent is the privately appointed receiver, it is necessary to understand some of the basic definitions and principles of agency law. Armed with this information, it will then be possible to analyse the receivership cases which deal with this issue, and ultimately to provide answers to this question which are sound both in agency law and in receivership law.

A. Terminology

An agency relationship arises when one party, the principal, enlists the assistance of another party, the agent, to act on his (the principal's) behalf. Typically, the agent is asked to enter into contracts on the principal's behalf, or to dispose of property which belongs to the principal.¹ In carrying out his responsibilities to the principal, the agent in his capacity as agent, enters into contracts with third parties. Through this process, it is the principal who is bound by the contract with the third party. An agency relationship,

therefore, is a representative one in which the agent enters into contracts or disposes of property on behalf of his principal.²

Applying these concepts to a receivership situation, it seems clear that the privately appointed receiver can affect another's legal position by the disposition of property, since it is the receiver's mandate to collect and dispose of the debtor corporation's property. If the receiver is also appointed as a manager, it seems inevitable that he will make contracts on behalf of the debtor corporation in the process of managing the company's business. Thus the privately appointed receiver meets the definition of an agent. It seems clear, therefore that there is a valid basis, both in agency law and in receivership law for holding that the receiver is acting as an agent.

It is more difficult, however, to determine whether the privately appointed receiver represents the debtor corporation or the secured creditor. Notwithstanding the common use of a deemed agency clause which deems the receiver to be the agent of the debtor corporation, the privately appointed receiver's primary goal is to enforce and realize upon the creditor's security.³ This implies that the privately appointed receiver is properly regarded as the agent of the secured creditor.

One possible means of reconciling this apparent contradiction regarding the receiver's agency status which arises when a deemed agency clause is included in a security instrument, is to state that both the debtor corporation and the secured creditor are the receiver's principals. If that is so, however, one must then determine whether or not it is possible for the privately appointed receiver to act

simultaneously as the agent for two separate and dissimilar principals. Some authorities state that this dual principalship is indeed possible, whereas others state that it is not possible. Bennett supports the existence of such a dual agency relationship:⁴

Where the security instrument provides for such a deemed agency clause, the receiver and manager is effectively a "double agent", acting on the one hand for the security holder in taking possession and in realizing, and on the other hand as agent for the debtor with respect to existing and new contracts, employees, landlords and generally trade creditors.

The existence of a dual agency relationship is not, however, widely supported by the common law. Although agents "normally . . . act on behalf of one principal in any given transaction,"⁵ it is possible at common law for an agent to act as the agent of more than one party in very limited situations such as that of an auctioneer,⁶ escrow holder or stakeholder⁷ who commonly act for two parties in the same transaction.

Further analysis of both agency law and of receivership law is required in order to determine who is the principal of the privately appointed receiver and upon what authority does this agency relationship exist.

B. Appointment and Authority of the Agent

An agent's authority is closely associated with the method which is used to appoint him. Authority and method of appointment are so closely linked, in fact, that it is difficult to discuss one without also discussing the other.

It is possible for a person to become an agent in one of several

different ways. He may be appointed by agreement, have his actions ratified ex post facto, or become an agent by operation of law by the imposition of principles of estoppel. A more detailed examination of each of these scenarios is warranted in order to determine what, if any, application they have to the receivership situation.

Once appointed, by definition, an agent has the ability to affect the principal's legal position. The exact extent to which the agent can act on behalf of the principal is determined by the authority which has been delegated to the agent. The extent of the agent's authority may be determined by examining his actual authority; implied, usual or customary authority; and his ostensible or apparent authority.

1. Appointment by Contract

An agency relationship most often arises, and an agent is appointed, when a consensus to that effect is reached between the principal and the agent.⁸ This consensus may be an express contract which is evidenced in writing, or it may be implied from the conduct of the parties.⁹

When a privately appointed receiver is appointed by the security holder, he usually receives notice of that appointment in written form.¹⁰ This written notice constitutes an express contractual agreement, and thus a privately appointed receiver normally obtains his authority to act as agent from an express contractual arrangement. The notice of appointment should indicate on whose behalf the receiver is acting and from this, the identity of his principal would be known, at least on a superficial basis.

2. Actual Authority — Express and Implied

An agent's "actual authority is the authority which in fact the agent has been given by the principal under the agreement or contract which has been made between them."¹¹ Actual authority may be further subdivided into authority which is either expressed in the agency contract, or implied by it.

An agent's express authority is that which is expressed in the document appointing him. In the case of a receiver acting as an agent, his actual authority consists of the powers which are expressly listed in the security agreement between the secured creditor and the debtor corporation.

An agent's implied authority, on the other hand, is not expressed in the agency contract. Rather, it is that authority which is necessarily implied in order to permit the agent properly to carry out his actual authority. Every agent has the implied authority to do those things which are necessary for, and ordinarily incidental to, carrying out his express authority according to the usual way in which such authority is executed.¹²

In determining what authority should be implied as being ordinarily incidental to the express authority which has been delegated to the agent, regard should be had to "what is usual in his trade, profession, or business for the purpose of carrying out his authority"¹³ and to what is customarily done in that "place, market or business."¹⁴

Turning once again to the situation of a receiver as agent, although the receiver is limited to the performance of those powers which are expressed in the security instrument pursuant to which he is appointed, certain powers will be considered as incidental to those express powers, and will therefore be implied in order to permit the receiver to execute the receivership of which he is in charge. For example, it is possible for a privately appointed receiver and manager who has been given the express power to carry on the business of the debtor corporation also to be given the implied authority to borrow money for the purpose of carrying on the business.¹⁵

3. Appointment by Ratification

Although an agency relationship is often created by an express or implied contract, it is possible for a person who has no existing contractual authority, to act as the agent of another. In such a situation the principal has the option of accepting or ratifying the agent's conduct after it has occurred and thereby creating a valid agency relationship after the acts in question have taken place.¹⁶

What the 'agent' does on behalf of the 'principal' is done at a time when the relation of principal and agent does not exist. . . . The agent, in fact, has no authority to do what he does at the time he does it. Subsequently, however, the principal, on whose behalf, though without whose authority, the agent has acted, accepts the agent's act, and adopts it, just as if there had been a prior authorization by the principal to do exactly what the agent has done.

When the principal subsequently ratifies the agent's actions in this fashion, "the agent is treated as having been authorized from the outset to act as he did."¹⁷

Thus where an agency relationship arises by ratification, the principal has the option of either accepting or not accepting the actions of the agent. If the principal is satisfied by the actions of the agent (or by the results of the agent's actions), the principal may accept those actions and thereby acknowledge that the agent had the authority to act as he did. In this way, the principal is entitled to benefit from the conduct of the agent.

4. Extension of the Agent's Authority by Ratification

As discussed above, ratification of the agent's actions by the principal may be employed to create an agency relationship where one did not previously exist. The concept of ratification can also be used to extend the powers which the principal has granted to the agent. Thus, where the agent exceeds the authority which was previously granted to him by the principal, the principal by ratifying that act may make it valid and effectual.¹⁸ However,¹⁹

anything that the agent does in excess of [the authority which has been granted to him] . . . will not affect the principal, unless the principal adopts what the agent has done in accordance with the doctrine of ratification. Moreover, if the agent acts outside his authority, he may be liable to his principal for breach of the contract of agency, or otherwise, or to the third party for breach of the implied warranty of authority.

How does the doctrine of ratification apply to the relationships which arise in a receivership? A privately appointed receiver possesses only those powers which are specifically granted by or expressed in the security instrument pursuant to which he is appointed (including a few powers which must be necessarily implied in order to permit the receiver

to carry out his express powers). If a privately appointed receiver performs an act which is beyond the scope of the powers listed in the security instrument it is not possible for his principal to accept, adopt, or ratify that act.²⁰

The receiver will be restricted to the powers set out in the security instrument and those conferred upon him by the letter of appointment. For example, if a power which is required is omitted, the receiver will have no authority to act. Where such powers are restricted, the security holder may have to proceed judicially for the appointment of a receiver and manager to circumvent the problem.

Thus, according to this leading Canadian authority in the area of receivership law, it would not be possible for the principal to extend the powers of the privately appointed receiver by ratification. Unfortunately, no authority or support for this position is provided with the result that the basis for such a statement is unclear.

In a receivership setting the debtor and creditor initially enter into a security contract which outlines the terms of the loan agreement in question. This agreement provides for the appointment of a receiver in the event of the debtor's default thereunder. It further outlines the powers which will be held by the privately appointed receiver. Arguably, if either the debtor corporation or the secured party unilaterally extended the receiver's powers through the use of ratification (or the doctrine of estoppel as discussed infra), that party could be unfairly prejudicing the contractual rights and interests of the other party. In the absence of any authority for the above-quoted statement, one can argue that this is the underlying rationale for the severe restriction on the receiver's powers. Upon closer examination, however, there appears to be no foundation for such a

limitation on the receiver's powers. If the debtor corporation breached the security agreement between the debtor and the creditor, by ratifying the receiver's acts and thereby extending the receiver's powers beyond those specifically outlined in the security agreement, surely the creditor could simply sue the debtor corporation for breach of the security agreement in question.

Notwithstanding that Bennett states that the receiver's powers are limited to those which are expressed in the security instrument pursuant to which he was appointed, it is submitted that this is too narrow of a position. Should the receiver's powers be extended unilaterally, the innocent party can bring an action for breach of contract against the other party to the security agreement. It is further submitted that the conclusion reached by Bennett is also questionable because when taken to its limit it would be impossible for the debtor corporation and security holder to reach a joint consensus regarding an extension of the powers contained in the security agreement.

If the security agreement is breached the injured party thereto can rely on its contractual remedies. Since a privately appointed receiver who acts in excess of his express or implied authority as an agent is personally liable for his actions,²¹ third parties who suffer damage as a result of the unauthorized extension of the receiver's authority can bring action against the receiver personally.

5. Appointment by Estoppel

An agency relationship may arise in circumstances where neither the agent nor the principal intend that such should occur. It is possible, as a result of "the application of the doctrine of estoppel, for an agency relationship to come about in the absence of true consent between principal and agent."²²

An agency relationship arises by estoppel in those situations where the principal has allowed the agent to behave in such a way that the principal is subsequently prohibited or estopped from denying that the agency relationship in fact existed. In other words,²³

a person who by words or conduct has allowed another to appear to the outside world to be his agent, with the result that third parties deal with him as his agent, cannot afterwards repudiate this apparent agency if to do so would cause injury to third parties; he is treated as being in the same position as if he had in fact authorized the agent to act in the way he has done.

An agency relationship based upon the doctrine of estoppel arises even though no true consent exists between the principal and agent, and thus it is considered to arise by operation of law.²⁴

6. Extension of the Agent's Authority by Estoppel

The doctrine of estoppel is not limited to the creation of an agency relationship. As with the concept of ratification, estoppel may also be applied to situations where the agency relationship is already in existence, with the result of extending the powers given to the agent pursuant to the original agency agreement. That is:²⁵

an agency relationship exists, having been created by agreement between the parties, but is limited by the

principal in a certain way, or for a certain purpose. By the application of estoppel . . . the agency relationship is made to apply to acts and transactions by the agent which the principal never agreed with him that he should perform or undertake.

Therefore, the doctrine of estoppel applies both to the creation and to the extension of the agency relationship.

a. Prerequisites for Agency by Estoppel

In order for agency by estoppel to arise by operation of law, the following prerequisites must be present, that is, there must be:²⁶

1. a representation by the principal;
2. a reliance on that representation by a third party; and
3. an alteration of the third party's position resulting from such reliance.

There must be some clear and unequivocal "statement or conduct on the part of the principal which can amount to a representation that the agent has authority to act on his behalf in the way he is acting."²⁷

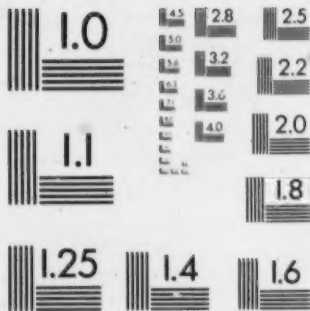
Based upon Bennett's statement quoted supra (at n. 20), it may be that as with ratification, the doctrine of estoppel cannot be used in a receivership situation in order to extend the authority of the receiver. The powers of the receiver are limited to those which are specifically enumerated in the security agreement. Conduct in excess of those powers is ultra vires the receiver, and should not be capable of being made intra vires by the doctrine of estoppel.

It is submitted, however, that this is too narrow of a view and that for the reasons expressed supra for the application of ratification

in a receivership relationship, it should be possible for the powers of the receiver to be extended by the doctrine of estoppel.

Having established a basic framework of agency law principles, it is now possible to analyse those receivership decisions which discuss the issue of whose agent is the privately appointed receiver. Upon the completion of this jurisprudential section, it will then be possible to answer the issue which is central to this thesis in a way which is consistent with both agency law and receivership law principles.

2



MicroD

ENDNOTES

Chapter V

1. B.S. Markensinis, An Outline of the Law of Agency (2d ed. 1986) 3.
2. G.H.L. Fridman, The Law of Agency (5th ed. 1983) 8.
3. F. Bennett, Receiverships (1985) 6.
4. Id. at 112.
5. E. Amirault and M. Archer, Canadian Business Law (3d ed. 1986) 429.
6. Fridman supra n. 2 at 40.

Note however that Bennett supra n. 3 at 112 states: "This [receivership] 'double agency' is a peculiar form of agency at common law". He does not provide any support or authority for this statement and the writer has been unable to locate any further authority for this statement. It is also interesting to note that major academic texts on the law of agency, such as Fridman supra n. 2 and F.M.B. Reynolds and B.J. Davenport, Bowstead on Agency (14th ed. 1976) do not have a specific reference or discussion of the receiver as agent; nor do they provide authority for the proposition that the receiver can act as agent for both the debtor and creditor simultaneously.

7. Canadian Business Law, supra n. 5.
8. Fridman, supra n. 2 at 47.
9. Id. at 48.
10. A.K. Kemp-Gee, "Insolvency in Practice: A Receiver's View," (1982) L.S.U.C. Spec. Lec. 615 at 628.
11. Fridman, supra n. 2 at 53.
12. Id. at 58.
13. Id. at 59.
14. Id. at 65.
15. Bennett, supra n. 3 at 125.

The receiver's power to manage and carry on the debtor's business usually includes, expressly or impliedly, the power to sell inventory in the ordinary

course, contract, hire employees of the debtor, agents, solicitors and independent contractors, as well as the power to borrow moneys required to carry on such business.

Also see: J. O'Donovan, Company Receivers & Managers (1981), 99.

16. Fridman, supra n. 2 at 73.
17. Id.
18. Bowstead on Agency, supra n. 6 at 37.
19. Fridman, supra n. 2 at 52.
20. Bennett, supra n. 3 at 18.
21. Thomas v. Todd, [1926] 2 K.B. 511; Gosling v. Gaskell, [1897] A.C. 575.

Note that it is this potential for personal liability which is most often raised in Britain when discussing whose agent is the privately appointed receiver. This potential for personal liability on the part of the receiver and the avoidance of such liability is also central to the British recommendations for law reform. See Sir Kenneth Cork, GBE, Report of the Review Committee on Insolvency Law & Practice, London, 1982, Cmnd. 8558. Also see A Revised Framework for Insolvency Law, Department of Trade and Industry, Feb. 1984, Cmnd. 9175.

22. Fridman, supra n. 2 at 97.
23. Id.
24. Id.
25. Id. at 99.
26. Caledonia Inc. v. Tractors & Equipment (1962) Ltd. (1980), 31 N.B.R. (2d) 32 at 40-42. In this case there was no reliance on the principal's representation by the third party, and therefore no agency by estoppel was created.
27. Fridman, supra n. 2 at 99.

VI. AGENCY STATUS OF THE PRIVATELY APPOINTED RECEIVER

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VI. AGENCY STATUS OF THE PRIVATELY APPOINTED RECEIVER

Having discussed the relevant background information and considered briefly the concepts of receiver and agent, it is now time to examine critically the jurisprudence on the issue of whose agent is the privately appointed receiver. For the purpose of answering this question, this thesis will concentrate on an analysis of the case law arising in Canada and in England in turn. American law is of limited assistance when answering this question because prior to the introduction of Article 9 of the American Uniform Commercial Code, the United States had not developed the concept of a floating charge over after acquired property.¹ Consequently, the resulting law relating to receivers and receivership has not developed in the United States in the same way that it has developed in Canada and England.

Determination of the agency status of a privately appointed receiver is important because the majority of receivers are appointed by instrument.² Furthermore, the status of the privately appointed receiver influences the performance of his duties. The status of the receiver should dictate to whom the receiver is answerable; to whom the

receiver owes duties; the effect of the Receivership appointment on the debtor corporation's existing contracts; and the rights of other creditors and guarantors of the debtor company.

Most debentures contain a clause³, which deems the receiver to be the agent of the debtor company.⁴ In the absence of such a deemed agency provision, the receiver is considered to be the agent of the security holder.⁵

The deemed agency provision raises a number of interesting problems and anomalies when considering the relationship between receivership law and agency law. For example, if the receiver is the agent of the debtor, then according to principles of agency law, the debtor, as principal, should be able to control and direct the receiver who is acting as his agent. This, however, is not the case. "The [privately appointed] receiver does not take instructions from the officers of the debtor, whose powers to control the assets have been suspended or anaesthetized"⁶ (emphasis added). As discussed in Chapter III. E., once a receiver has been appointed, the board of directors' powers to realize the assets of the company and to manage the business of the company are largely suspended. Given their lack of capacity in these areas, it seems inconsistent that the directors of the debtor corporation would have the ability to advise and direct the receiver in his functions. An agent must take instruction from someone, and if the debtor company is incapable of controlling the receiver, who can instruct the receiver as agent? "In practice, [in a deemed agency situation] a privately appointed receiver takes instructions from the security holder [emphasis added]."⁷

If the debtor company is in fact the receiver's principal, then according to agency law, the debtor should be able to terminate the agency relationship at will. This is not the case in a receivership situation because, as discussed in Chapter I, the debtor corporation has contracted out of its right to terminate its agent. As discussed by Lord Justice Rigby in Gaskell v. Gosling, by the terms of the security agreement, the mortgagor (debtor corporation) has contractually agreed with the mortgagee (security holder) that he "cannot of his own will revoke the appointment of a receiver."⁸ It is the creditor, or security holder, who is given the authority to terminate the deemed agency relationship which exists between the receiver and the debtor corporation.⁹

There is some controversy in Canada as to the receiver's ability to convey title to the debtor's property to a subsequent purchaser. If the receiver is the agent of the debtor, he should be in no better position than the debtor company and consequently the receiver should only be able to transfer title to the property subject to all existing encumbrances. If, on the other hand, the receiver is considered to be the agent of the debenture holder then he should be able to convey the property free of any encumbrances which are subsequent to the debenture, since the debenture has priority over all subsequent encumbrances. As will be seen from a discussion of the jurisprudence in this area, infra, the receiver's ability to pass title upon sale of the debtor's property has not been completely resolved.

Because of the inconsistencies which exist between receivership law and agency law, it is important to examine these areas of the law and in particular to determine how they overlap in the case of a privately appointed receiver.

A. Analysis of Canadian Jurisprudence

The following analysis of Canadian cases dealing with the agency status of the privately appointed receiver illustrate how the courts have combined the overlapping principles of agency law and receivership law.

1. Ability of the Company to Control or Direct the Receiver

When a receiver is appointed privately pursuant to the provisions contained in a security instrument, the company, acting through its board of directors, is left with minimal power and authority. The issue of the degree of power and control which remains with the company was raised by two Canadian cases: Ostrander v. Niagara Helicopters Ltd.,¹⁰ and Re Paradise Gardens Restaurant Ltd. and Federal Business Development Bank.¹¹

The Ostrander v. Niagara Helicopters Ltd. case appears to be one of the earliest Canadian decisions in this area. This case, which includes an often quoted discussion of the distinction between the duties of a privately appointed receiver and a court appointed receiver,¹² involved an attempt by Ostrander, the major shareholder of the debtor corporation, Niagara Helicopters Ltd., to have a sale of the business, which had been entered into by the receiver, set aside. Mr.

Justice Stark of the Ontario High Court of Justice indicated that the sale of the business by the receiver could only be impugned if the receiver had breached a fiduciary duty to the debtor company or its shareholders. The Court held, however, that the privately appointed receiver did not in fact act in a fiduciary capacity towards either the shareholders or the debtor company. The only duty which the privately appointed receiver owed to these particular parties was a duty "to act in good faith and without fraud,"¹³ and since the receiver so acted in this situation, the shareholder had no basis for attacking the sale of the business.

During the course of his judgment, Mr. Justice Stark makes the following statement regarding the duties and obligations of receivers and regarding the agency status of a privately appointed receiver:¹⁴

A very clear distinction must be drawn between the duties and obligations of a receiver-manager . . . appointed by virtue of the contractual clauses of a mortgage deed and the duties and obligations of a receiver-manager who is appointed by the Court and whose sole authority is derived from that Court appointment and from the directions given him by the Court. In the latter case he is an officer of the Court; is very definitely in a fiduciary capacity to all parties involved in the contest. [Note that the Court now appears to switch to a discussion of a privately appointed receiver.] The borrower, in consideration of the receipt by him of the proceeds of the loan agrees in advance to the terms of the trust deed and to the provisions by which the security may be enforced. In this document he accepts in advance the conditions upon which a sale is to be made, the nature of the advertising that is to be done, the fixing of the amount of the reserve bid and all the other provisions contained therein relating to the conduct of the sale. In carrying on the business of the company pending the sale, he [the receiver] acts as agent for the lender and he makes the decisions formerly made by the proprietors of the company . . . As long as the receiver-manager acts reasonably in the conduct of the business and of course without any ulterior interest, and as long as he ensures

that a fair sale is conducted and that he ultimately makes a proper accounting to the mortgagor, he has fulfilled his role which is chiefly of course to protect the security for the benefit of the bondholder [emphasis added].

Based on this decision, a Court appointed receiver must act in a fiduciary capacity towards all parties concerned, whereas a privately appointed receiver acts as an agent of the security holder and owes only minimal duties of fairness and accountability to the debtor corporation. Note however that court states that in "carrying on the business of the company pending sale," the receiver acts as the agent of the lender. It does not hold that under all circumstances the receiver is the agent of the lender.

Regrettably, the judgment is silent regarding the terms of the debenture under which the receiver was appointed in this particular case. It merely states that counsel for the shareholder admitted that the receiver "was appointed receiver and manager as the agent of . . . [the debenture holder] for the purpose of enforcing and protecting its security."¹⁵ It is not clear whether the receiver was deemed by the debenture to be an agent of the debtor corporation. If there was no deemed agency clause in the debenture, perhaps the court's conclusion that a privately appointed receiver is the agent of the lender should be limited to those security instruments which do not contain a deemed agency clause. Furthermore if there were a deemed agency clause in this debenture, Mr. Justice Stark fails to address the inconsistency which exists between the debenture stating that the receiver is to be deemed to be the agent of the debtor, but counsel agreeing that the privately appointed receiver is the agent of the secured creditor.

In the Ostrander case the debenture holder was clearly the controlling mind behind the actions of the receiver. For example, it was the debenture holder who assessed the acceptability of the tenders submitted for the sale of the debtor corporation's business.¹⁶ Furthermore, Mr. Justice Stark seems to accept, without question, the ability of the security holder to make an assessment of this nature.¹⁷

From this analysis of Ostrander v. Niagara Helicopters Ltd. it is possible to argue that its conclusion, that the privately appointed receiver is the agent of the security holder, does not have a broad applicability but should be restricted to those situations where the receiver is clearly carrying on the debtor's business pending sale, or where the debtor and security holder agree that the receiver is acting as the agent of the security holder. Although most of the cases which follow and apply Ostrander do not adopt such a narrow interpretation of this judgment, the Ontario Court of Appeal in Peat Marwick v. Consumers' Gas¹⁸ does limit the Ostrander decision in the following terms:

[Ostrander] was concerned with the liability of a receiver and manager to the debtor company, not with the liability of the receiver and manager to third parties. While it may be legitimate . . . for some purposes to regard the receiver and manager as the agent of the debenture holder, I do not think that the judgment of Stark, J. can be relied on as authority that, for all purposes, the receiver and manager is the agent of the debenture holder.

The company's ability to object to the sale of its business was also an issue in the case of Re Paradise Gardens Restaurant and Federal Business Development Bank.¹⁹ In this case a receiver, who was appointed privately pursuant to a debenture containing a standard deemed agency clause, accepted an offer for sale of the debtor corporation's

restaurant. Since the offer in question would only produce sufficient funds to repay one-third of the debtor's liabilities, the debtor company in this application sought a perpetual injunction enjoining the receiver from selling the assets of the company.

If the receiver in fact acts as the agent of the debtor, then an application for an injunction prohibiting sale by the receiver should be unnecessary. Based on agency law principles, if the receiver is acting as the agent of the debtor corporation, then the corporation should be able to give instructions directly to the receiver (its agent), and the receiver should be required to act in accordance with those instructions. Consequently, the company should be able to object to the sale of its business by its own agent before the sale occurs and thereby prevent an undesirable sale. The company (as principal) would only be bound by the sale if the sale had been completed, and if the receiver, as agent, had been acting within proper scope of his authority to conclude the sale. If the agent had exceeded his authority by proceeding with the sale, the corporation, as principal, would be able to commence an action against the receiver for breach of authority.

The mere fact that an injunction application was brought in Re Paradise Gardens Restaurant Ltd. illustrates that the deemed agency relationship in a receivership situation does not completely mesh with a typical principal-agent relationship. In this decision, Mr. Justice Egbert discusses the deemed agency provision in the debenture and relies upon the Ontario Court of Appeal decision in Pest Marwick Ltd. v. Consumers' Gas Co.²⁰ in coming to his conclusion that the application must be dismissed and the injunction denied.

The court in Re Paradise Gardens Restaurant Ltd. agreed with the Peat Marwick Ltd. v. Consumers' Gas Co. analysis of the deemed agency clause (which analysis is discussed in detail infra), and applied the two hat theory arising from Peat Marwick Ltd. The court held that it is possible for the receiver to act as the agent of the debtor in certain circumstances, and as the agent of the security holder in other circumstances. Egbert, J. held that the deemed agency clause which is contained in most debentures "simply protects the receiver vis-a-vis third parties so that the company will be liable for the acts of the receiver with probably a right over against the receiver in case of fraud or negligence."²¹ Based on this interpretation of the deemed agency clause, the court concluded that the rights of the company had not been breached in this case and consequently that the corporation could not prevent the receiver, who had acted in good faith throughout, from completing the sale of the company's assets.

Although this judgment never states directly who is the receiver's principal, it is apparent that the receiver in Re Paradise Gardens Restaurant Ltd. was acting as the agent of the security holder in the sale of the assets of the debtor company. Thus in the absence of fraud or negligence on the part of the receiver, the debtor corporation was not capable of interfering with the receiver's sale of the company's assets.

Based upon this discussion of Ostrander v. Niagara Helicopters Ltd. and Re Paradise Gardens Restaurant Ltd., the debtor corporation's ability to control or direct the receiver is dependent upon an



interpretation of the agency status of the privately appointed receiver. The court in Ostrander held that the receiver was acting as the agent of the debenture holder. Consequently, the debenture holder was able to control and direct the receiver's actions and decisions. In this situation, the receiver could not be controlled by the debtor corporation, which was only owed duties of good faith and the absence of fraud.

Similarly, in Re Paradise Gardens Restaurant Ltd., the court found that the receiver was acting as the agent of the debenture holder and that the debtor corporation was not, therefore, entitled to object to the receiver's actions. Interestingly, the finding that the receiver was the agent of the debenture holder was made, in the face of an express clause in the security agreement which deemed the receiver to be the agent of the debtor corporation. The court refused to interpret this deemed agency clause literally, however, but rather, found that notwithstanding the existence of the deemed agency clause, the receiver in this case was functioning as the agent of the debenture holder. As in Ostrander, the receiver owed duties of good faith to the debtor corporation, but was not obligated to heed the instructions of the debtor.

2. Supply of Utilities

Perhaps the most significant Canadian case dealing with the issue of whose agent is the privately appointed receiver is the 1980 decision of the Ontario Court of Appeal in Peat Marwick Ltd. v. Consumers' Gas Co.²²

The facts in Peat Marwick Ltd. v. Consumers' Gas Co. are straight forward. A privately appointed receiver, who was deemed to be the agent of the debtor corporation pursuant to the terms of the debenture under which he was appointed, took possession of the premises owned by the debtor corporation. Prior to the appointment of the receiver the debtor had failed to pay monies due and owing to Consumers' Gas Co. for the gas supplied by it to the debtor's premises. Following the appointment of the receiver, Consumers' Gas Co. requested payment of these arrears from the receiver, failing which it intended to cut off the gas supply to the debtor's premises. Eventually, the receiver paid the arrears, under protest, and then sued Consumers' Gas Co., for return of that payment.

Both the Ontario High Court and the Ontario Court of Appeal held that the receiver was required to pay the arrears in question, and consequently the receiver was not successful in its demand for the return of the monies which it had paid under protest. The two courts did, however, take slightly different approaches to reach this conclusion.

Mr. Justice Galligan of the Ontario High Court adopted a literal approach in interpreting the debenture pursuant to which the receiver was privately appointed. The deemed agency provision contained in the debenture, stated that "the receiver shall for all purposes be deemed to be the agent of the Company and not of the Bank."²³ The court indicated that these plain words in the contract could not be disregarded. Since the receiver was acting as agent of the debtor corporation, and the receiver was now in possession of the debtor's premises, the court held

that the gas company was justified in demanding and obtaining payment of the arrears from the receiver in order to ensure a continued supply of gas to the said premises.²⁴

The Ontario Court of Appeal on the other hand, went much further than a simple statement that the receiver is liable as the agent of the debtor corporation. This decision is famous for expounding the "two hat" theory which postulates that it is possible for the receiver to act both as agent for the debtor corporation and as agent for the creditor (debenture holder), depending upon the type of conduct in which he is engaged. As stated by Houlden, J.A. on behalf of the Ontario Court of Appeal:²⁵

It seems to me that the receiver and manager in a situation, like the present, is wearing two hats. When wearing one hat, he is the agent of the debtor company; when wearing the other, the agent of the debenture holder. In occupying the premises of the debtor and in carrying on the business, the receiver and manager acts as the agent of the debtor company. In realizing the security of the debenture holder, notwithstanding the language of the debenture, he acts as the agent of the debenture holder, and thus is able to confer title on a purchaser free of encumbrance.

By virtue of this pronouncement, the Court of Appeal seems to be indicating that one should not take a literal approach to the interpretation of a deemed agency clause as was done by the trial judge in this case. Rather, it is necessary to assess the functions which are being performed by the receiver in order to determine who is the receiver's principal. If the receiver is in possession of the debtor's premises and carrying on the debtor's business, he is exercising his managerial functions, and according to Mr. Justice Houlden, the receiver should properly be regarded as acting as the agent of the debtor

corporation. If, however, the receiver is realizing upon the security of the debenture holder, that is, gathering in and selling the assets covered by the security agreement, he is exercising his function and mandate as a receiver simpliciter, and should properly be regarded as acting as the agent of the creditor or security holder.

Applying this two hat analysis, the Court of Appeal in Peat Marwick Ltd. v. Consumers' Gas Co. held, that by occupying the debtor's premises and continuing the operation of its business, the receiver was performing its managerial functions, and was therefore acting as the agent of the debtor corporation. Consequently, the receiver was liable for the payment of gas which had previously been supplied to the debtor's premises.

3. Nature of the Receiver's Possession

Roynat Ltd. v. Denis²⁶ relied upon Peat Marwick Ltd. v. Consumers' Gas Co. when discussing the nature of the receiver's possession of the debtor's property and business. In this case the debenture holder appointed a receiver-manager who operated the debtor's business and subsequently advertised the business for sale. Following receipt of an offer to purchase, the debenture holder applied to the court to have a privately appointed receiver converted to a court appointed receiver. This conversion was necessary because, in Saskatchewan, the approval of the court is required in order for the receiver to transfer title to the debtor's property to a subsequent purchaser. The court also ordered that the proposed sale be approved. Since the purchase price was insufficient to repay the funds which had been advanced under the

debenture the debenture holder then commenced an action against the guarantor of the debenture for the deficiency. At trial, judgment for the deficiency was entered. The subsequent appeal by the guarantor was dismissed. The guarantors argued before the Saskatchewan Court of Appeal that the receiver-manager's entry into possession of the debtor's premises was illegal and therefore constituted a trespass with the result that the guarantee was thereby vitiated.

In dismissing the guarantor's argument, the Saskatchewan Court of Appeal stated:²⁷

In entering [the debtor corporation's premises] . . . and taking possession of the business, the receiver-manager in this case was acting as agent of the mortgagee [sic] pursuant to the terms of the debenture; vide Peat Marwick Ltd. v. Consumers' Gas Co. . . . (Ont. C.A.). The entry was not tainted with illegality and accordingly no trespass occurred. This ground of appeal accordingly fails.

Although Mr. Justice Tallis, on behalf of the court, indicated that the receiver took possession of the business as agent of the mortgagee (that is, the debenture holder), this surely appears to be an inadvertent error in light of his express reliance on Peat Marwick Ltd. v. Consumers' Gas Co. Surely, Tallis, J.A. must have meant to say that the receiver who took possession of the premises and then operated the business of the debtor company, as would a manager, entered into possession as agent of the mortgagor or debtor corporation. This result would be consistent with the Ontario Court of Appeal's decision in Peat Marwick Ltd. v. Consumers' Gas Co. To hold that the receiver, acting as manager, is the agent of the debenture holder would be contrary to the previous Ontario Court of Appeal ruling. Moreover, if the receiver did

enter upon the land as the agent of the mortgagee, debenture holder, there would have been no consent from the mortgagor, debtor corporation, who owns the land, with the result that a trespass would indeed have occurred.

As the judgment is written, Roynat Ltd. v. Denis is authority for the statement that the receiver is the agent of the debenture holder. Subsequent cases, such as Prairie Roadbuilders Ltd. v. County of Stettler²⁷ confirm this interpretation of the Saskatchewan Court of Appeal's decision. It is submitted, however, that these statements in Roynat Ltd. v. Denis as well as the cases which apply Roynat Ltd. v. Denis should not be relied upon due to the possible confusion which is present regarding the use of the terms mortgagor and mortgagee, discussed supra.

4. Employment and Other Related Issues

When a company that normally hires and operates its business through employees, goes into receivership, the receiver, upon appointment, is faced with a number of interesting issues relating to those employees. In this situation it is necessary to resolve questions such as the following:

1. Is the receiver bound by the existing contracts of employment?
2. Is the receiver liable under the Income Tax Act, as well as various other federal and provincial statutes for employee deductions such as income tax, Canada Pension Plan, unemployment insurance and Worker's Compensation contributions?

3. Is the receiver responsible for the safety of the workplace and the general health and safety of the employees who work on the premises of the debtor corporation?
4. Must the receiver provide notice or payment in lieu of notice when employment contracts are terminated, and if so, how is the notice period to be calculated?

As will be seen from the following discussion of the Canadian jurisprudence dealing with some of these employment issues, the receiver's liability in these situations often depends upon his status as agent, and an interpretation of the obligations which flow therefrom.

United Food and Commercial Workers International Union v. National Bank²⁹ deals with the issue of whether or not a receiver is bound by the terms of the collective agreement existing between the debtor corporation and its employees. In U.F.C.W. v. National Bank a privately appointed receiver hired the debtor's employees to assist in winding-down the company's business affairs. In conducting these duties the employees were paid the same rate of wages as they had received prior to the receivership, but the terms of the collective agreement between the debtor company and its employees were not followed. In particular the receiver did not deduct or remit union dues as required by the collective agreement. Consequently, the Union sought a declaration that the Bank, as holder of the debenture, was a successor employer within the meaning of s. 63 of the Ontario Labour Relations Act³⁰, and that the Bank was, therefore, under an obligation to pay the union dues which were owing to the Union and unpaid by the company.

The Ontario Labour Relations Board held that the receiver was liable for payment of union dues pursuant to the collective agreement. This liability did not, however, stem from the fact that the receiver was a successor employer. Instead the Board held that pursuant to the deemed agency clause outlined in the debenture, the receiver was an agent of the debtor corporation and consequently there was no sale or transfer of the business within the meaning of the Labour Relations Act.³¹ Since the receiver was the debtor company's agent, he was in effect "a person acting on behalf of the insolvent employer for the purposes of s. 64 of the Labour Relations Act."³² As such, the receiver was held to be "liable in his own right, independently of the liability of his principal for his unlawful conduct."³³ The Board held that once the receiver was appointed, he became the effective employer on behalf of the debtor corporation, and thus was bound by the terms of the collective agreement. The receiver's failure to deduct and remit union dues following his appointment, amounted to interference with the administration of a trade union, contrary to s. 64 of the Ontario Labour Relations Act, which section prohibits an employer or anyone acting on behalf of an employer from so interfering. Since the receiver was the agent of the employer, debtor corporation, the receiver was violating the Act. As stated by the Labour Relations Board in U.F.C.W. v. National Bank, "a person acting on behalf of an employer who violates the Act is liable in his own right, independently of the liability of his principal for his unlawful conduct".³⁴ Thus the receiver was held to be personally liable for the payment of the union dues which had not been deducted following the appointment of the receiver. Although the

statements regarding the agency status of the privately appointed receiver enunciated in U.F.C.W. v. National Bank are of great interest, the fact that this is a decision of the Labour Relations Board renders it of limited authority for use as a precedent. Furthermore, the general applicability of its statements on this issue may be restricted on the basis that the board was concerned with the interpretation of specific legislative enactments.

It is interesting to note that the receiver was not liable for payment of the union dues which had been deducted from the employees' wages prior to his appointment, but which the company had failed to remit to the Union, (as it was required to do pursuant to the terms of the collective agreement). This finding was based on the fact that there was no evidence that the receiver had appropriated any of the funds for itself or the bank.³⁵ This is consistent with the normal principles of agency law, since surely the agent should not be personally liable for the acts of the principal which occurred prior to the agent's appointment unless, of course, the agent participated in those acts in some way (such as by sharing in the proceeds of a wrongful act by the principal).

When considering the status of a receiver as a successor employer, it is most important to determine whether the receiver was appointed privately or by the court. Where the receiver is court appointed, all employment contracts with the debtor corporation are automatically terminated with the result that:³⁶

a court appointed receiver-manager can be found to be a successor employer. The appointment can properly be

characterized as a transfer or other disposition within the meaning of . . . the Labour Code. A court appointed receiver-manager obtains possession and control of the assets of the corporation and, to the extent it operates the business, it does so as a principal. Thereafter, there is an employment relationship between the receiver-manager and the employees of the business.

The appointment of a receiver by instrument does not, however, of necessity terminate the employment contracts of the debtor's employees.³⁷ The private appointment of a receiver may, however, operate so as to terminate the employment of "senior executives because their functions are seen to impinge upon the management rights and responsibilities of the receiver."³⁸

The receiver's liability for failing to deduct income tax from the wages of the debtor company's employees was considered in the case of R. v. Coopers & Lybrand Ltd.³⁹ In this case the receiver was privately appointed pursuant to a debenture which contained a provision deeming the receiver for all purposes to be the agent of the debtor corporation and not the agent of the bank.⁴⁰ The receiver continued the operation of the debtor corporation, and in the course of this management period enlisted the services of the debtor company's existing employees. Wages were paid to the employees, however income taxes were neither deducted from those wages nor remitted to the appropriate authority. Consequently the Crown commenced an action against the receiver for payment of the aggregate of the amounts required to be deducted pursuant to s. 153 of the Income Tax Act.

In order for the court to determine the issues of liability under s. 153 of the Income Tax Act, it was necessary first to determine whether or not the receiver was a person paying wages or salaries to

employees. In order to answer this question the court considered the issue of the agency status of the receiver. The receiver was deemed, by the terms of the debenture, to be the agent of the debtor corporation. Notwithstanding the existence of this deemed agency provision, however, the court acknowledged that the receiver was not properly to be regarded as the agent of the debtor in all situations. According to the Federal Court of Appeal, in R. v. Coopers & Lybrand Ltd.:⁴¹

One exercising the office of receiver-manager is acting for the benefit of the debenture holders. He is not appointed to carry on the business of the company in the best interest of the company; he is appointed to realize the security of the debenture holders: Re. B. Johnson & Co. (Builders) Ltd. [1955] Ch. 634, [1955] 2 All E.R. 775 (C.A.).⁴² While the debenture itself states that the receiver-manager is agent of the debenture debtor, the chief purpose of this provision (which is a contractual one . . .) is to confirm title that the receiver-manager seeks to hold out to any third party dealing with it and to exonerate the bank from any responsibility for acts of the receiver-manager. The powers of the receiver-manager are really ancillary to the main purpose of the appointment, which is the realization for the debenture holder of its security. The receiver-manager is akin to a mortgagee in possession. The receiver-manager taking possession of the property subject to the charge becomes the manager of that property of the debtor but not the manager of the debtor company.

By these statements, the court seems to be saying that although it is necessary to examine the provisions of the debenture in order to determine the status of the receiver, deemed agency provisions are not to be interpreted literally in all cases, or for all purposes. One must examine the primary purpose for which the receiver was appointed which, according to the Federal Court of Appeal in this case, is the realization of the Bank's security. The Court states that the deemed agency provision in the debenture is one of convenience which permits

the following: 1) it allows the receiver to pass title to the debtor's property to third parties, and 2) it exonerates the bank from any liability for the acts of the receiver manager.

Based on the court's analysis of the situation one would anticipate that either the debenture holder would be liable for the failure to deduct and remit income tax as being the principal in control of the receiver, or alternatively that the debtor corporation would be liable as the deemed principal of the receiver (thereby satisfying the above-noted second reason for including a deemed agency provision in a debenture).

In fact, neither the debtor corporation nor the debenture holder were held liable in this case. Instead, the receiver was held to be personally liable for payment of monies which were not deducted for income tax purposes.

In order to reach this conclusion, the court held that the receiver went into possession of the debtor corporation's property "for the purpose of realizing that property for the benefit of the bank."⁴³ Furthermore, it was in the best interest of the bank for the employees to continue with their normal duties. In order to encourage this employee assistance, it was expedient for the receiver to advance unpaid wages to each employee. Although this would imply that the receiver acted as the agent of the debenture holder, liability in this case was not based upon that factor. Rather, the court held that even assuming that the receiver was agent of the debtor corporation, the debtor was financially unable to advance sufficient funds to the employees to satisfy their claims for unpaid wages. Since it was the receiver and

not the bank who caused the payment to be made, the court held that the receiver, personally, was the person paying wages to the employees. As such, the receiver was held to be personally liable for its failure to make deductions for income tax purposes. The receiver's liability was assessed, based on criteria enunciated in the Income Tax Act, as ten percent of the amount which had not been deducted.

It would appear, therefore, that at least in certain employment situations, the receiver will be personally liable, or in effect, liable as a principal for his acts or omissions. It is possible to argue, however, that the personal liability of the privately appointed receiver results from an extension of the concept that the receiver is acting as the agent of the debtor corporation, coupled with the interpretation and application of statutory provisions which are directed towards the protection of employee rights. That is, the receiver is viewed initially as being the agent of the debtor. As the debtor corporation's agent, the receiver is subsequently found to be personally liable to the debtor's employees pursuant to the governing statutes and regulations. The provisions of the governing statutes which protect the employee are merely a reflection of a public policy decision to protect the rights of innocent employees.

Personal liability on the part of the receiver was also found to exist in Roché v. The Battery Ltd. & Peat Marwick Ltd.⁴⁴ In this case a privately appointed receiver who was deemed by the security instrument to be the agent of the debtor company, terminated all of the contracts of employment of the debtor's employees. The receiver then rehired the

plaintiff Roche to work as an assistant chef for a short period of time. Roche's employment was terminated by the receiver after a five-week period and at that time he was given two weeks pay in lieu of notice. The plaintiff commenced a wrongful dismissal action against both the debtor and the receiver claiming that he was entitled to more notice based upon his sixteen-year record of service with the debtor corporation.

In determining whether or not the plaintiff employee was entitled to "a period of notice that is measured in part by reference to the length of service of that person with the company in receivership,"⁴⁵ Goodridge, J. discussed the issue of whose agent is the privately appointed receiver.

The debenture pursuant to which the receiver was appointed in Roche v. The Battery Ltd. contained the following deemed agency provision: "every such receiver shall, so far as concerns responsibility for his acts, be deemed the agent of the company."⁴⁶

As can be seen from the following excerpts from his decision, Mr. Justice Goodridge does not take a literal approach to the interpretation of this deemed agency clause. He indicates that one must examine the function which the receiver is performing in order to determine his status.⁴⁷

A manager operates the business, basically supplanting the directors and executive management . . . a receiver on the other hand liquidates the business and applies the proceeds to discharge the secured debt of the creditor who appointed it. . . .

When a receiver acts as a manager it acts as an agent of the debtor company. When it acts as receiver it acts as agent of the creditor company [security holder].

In each capacity it is a person in its own right which can only function through its own agents, generally its employees.

The three hats worn by a receiver are:

1. As receiver, the hat of the secured creditor;
2. As manager, the hat of the company in receivership;
and
3. In its own right, its own hat.

Regrettably, Mr. Justice Goodridge does not cite any authority for these statements. He appears to rely (without so indicating in the judgment) upon the decision in Peat Marwick Ltd. v. Consumers' Gas Co.⁴⁸ by his reference to the receiver acting as agent for the security holder when performing straight receivership functions, and acting as agent for the debtor corporation when performing managerial functions. He recognizes a third possibility, however, namely the ability of the receiver to act in effect as a principal in its own right.

The court applied the basic principles set out in the quote excerpted above to the fact situation before it, and held that when Peat Marwick was appointed receiver it terminated the contracts of employment of all of the Battery's employees, and then "hired those employees itself to carry out the management functions which included the carrying on of business."⁴⁹ Based upon this, one would anticipate that the receiver was acting as an agent of the debtor corporation since it was functioning as a manager of the business when it rehired the employees. This, however, was not the conclusion which was reached in the case. Rather, the court indicated that the employees who were rehired by the receiver⁵⁰

had become part of the management team that Peat Marwick sent in to operate the Battery as a going concern until it

could be resold . . . [The receiver] testified that the practice in the receivership industry is for the manager on behalf of the debtor company to terminate the employees and for the manager in its own right to hire them [emphasis added].

Based on this evidence Mr. Justice Goodridge concludes that "it was the third hat that Peat Marwick was wearing when it hired Mr. Roche and the other employees"⁵¹ and consequently, the receiver, Peat Marwick, was held to be "personally responsible to former Battery employees hired by it."⁵² Since the receiver was acting in its own right in hiring the employees, and was not acting as agent of the debtor company, the plaintiff was not entitled to receive notice of termination with reference to his period of employment with the debtor corporation.

Based on the cases which discuss employment and related issues, one can conclude that in Canada there appears to be a tendency to find that the receiver acts as agent for neither the debtor corporation nor the security holder, but rather has an independent status and thus incurs personal liability for his actions.

5. Ability of the Receiver to Transfer Title

Many interesting issues arise when discussing the ability of the privately appointed receiver to transfer title to the debtor corporation's property. For example, does the receiver have any authority to transfer title to a third party? If the receiver is the agent of the debtor, presumably the receiver has authority to transfer

title as agent of the debtor. Where, however, does the authority to transfer title arise if the receiver is the agent of the creditor? Another question which must be considered, assuming that the receiver has authority to transfer title in the first place, is what is the quality of title which is passed? In particular, is the receiver able to pass title to the property which is free and clear of all encumbrances which are subsequent to the debenture pursuant to which he was appointed?

a. Authority to Transfer Title

In order to determine what powers of sale are possessed by the receiver it is necessary to examine the debenture pursuant to which he was appointed and to determine what powers have been granted to him thereunder.⁵³

The appointment of a receiver does not [by itself] confer title upon the receiver. The authority to sell does not stem from ownership of the collateral. In the case of a private appointment, the security instrument will provide for a contractual power of sale.

Thus, the receiver will have the ability to sell the debtor's property if the power of sale has been specifically granted to the receiver by the terms of the debenture.

b. Quality of Title which is Transferred

The quality of title which is passed by the privately appointed receiver is related to the receiver's status as agent. Diegel & Feick Inc. v. Donia Consulting Corp.⁵⁴ considered whether sale of the debtor corporation's business, by the privately appointed receiver manager,

defeated the other security interests which were registered subsequent to the security document which was being enforced. The court held in this case that priority of registration prevailed and gave to "the bank power to sell through the receiver and manager without the assets sold being subject to the claims of the subsequent encumbrances."⁵⁵

The debenture under which the receiver was appointed contained the standard deemed agency provision and it was argued in this case that if the receiver was in fact acting on behalf of the debtor then all subsequent encumbrances should remain in effect since the receiver could not possibly pass better title than the debtor would be able to. This argument was dismissed, however, based on the English Court of Appeal decision in Re B. Johnson & Co. (Builders) Ltd.⁵⁶ which stated that privately appointed receiver managers are:⁵⁷

treated, while in possession of the company's assets and exercising the various powers conferred upon them, as agents of the company in order that they may be able to deal effectively with third parties. But in such a case as the present . . . it is quite plain that a person appointed as receiver and manager is concerned, not for the benefit of the company but for the benefit of the mortgagee bank, to realize the security; that is the whole purpose of his appointment and the powers which are conferred upon him . . . are . . . really ancillary to the main purpose of the appointment, which is the realization by the mortgagee of the security (in this case, as is commonly) by the sale of assets.

Mr. Justice Eberle interpreted these comments in Re B. Johnson & Co. (Builders) Ltd. to mean that in certain respects the receiver acts as agent of the debtor corporation, but with respect to the sale of the company's assets the receiver acts as the agent of the debenture holder.⁵⁸ Since the receiver is acting as agent of the security holder

which takes priority over all subsequent encumbrances, the receiver is able to pass title which is free and clear of all subsequent encumbrances.

This then seems to answer the question of what is the quality of the title which is passed by the privately appointed receiver. It is, according to the Diegel & Feick Inc. decision, title which is free and clear of subsequent encumbrances based on the notion that when liquidating the debtor corporation's assets the receiver is acting as the agent of the security holder.

c. Transfer of Title to Land

The problems which are associated with the receiver's ability to pass title are apparent when one considers the transfer of land by a receiver in a Torrens jurisdiction of land registration, such as in Alberta and Saskatchewan. Under the Torrens System the debtor corporation is shown on title as being the registered owner of the land. Normally the Registrar of Land Titles will only transfer title to land if the transfer is properly executed by the registered owner of the property.⁵⁹ In a receivership situation, however, the board of directors' power to deal with assets which are subject to the receivership are suspended,⁶⁰ and consequently execution of a transfer of land by the debtor corporation may not be possible. In addition to this, even if the company retains the capacity to execute the transfer, the corporation may choose not to cooperate with the bank and "its" receiver. The following Canadian cases⁶¹ each deal with the issue of transfer of title to land by the receiver, and in so doing, each

comments upon the receiver's status as agent: Alberta Treasury Branches v. Ryan Construction Ltd.,⁶² Femco Financial Corp. Ltd. v. Femco Ventures Ltd.,⁶³ Clarkson Co. Ltd. v. Wiebe Holdings Ltd.⁶⁴ and Price Waterhouse Ltd. v. Saskatchewan Economic Development Corp.⁶⁵

In Alberta Treasury Branches v. Ryan Construction Ltd. the receiver applied for a court order directing the Registrar of Land Titles to cancel the existing certificate of title which was registered in the name of the debtor corporation, and to issue a new title to the purchaser of the lands to whom the receiver had arranged a sale. Although the debenture pursuant to which the receiver was privately appointed granted to the receiver the specific power to take possession of the property charged by the debenture, and to sell the same, it did not give the receiver a power of attorney to execute the required transfer of land. The debenture also deemed the receiver to be the agent of the debtor corporation. Based on these provisions, Mr. Justice Hope of the Alberta Court of Queen's Bench, on appeal from the Master in Chambers, arrived at the following conclusion:⁶⁶

I would be of the opinion that the granting of the power to sell, in the absence of some written restriction placed upon it being completed (such as approval by . . . [the debtor company]) carries with it by necessary implication the power to take such steps as may be necessary to effect a conveyance or in other words to perfect the already authorized sale. Since the debenture does not make the receiver its attorney to execute a transfer under the Land Titles Act, R.S.A. 1980, c. L-5, then the assistance of the court may be sought. Further, since the debenture makes the receiver the agent of . . . [the debtor corporation] for its acts, . . . [the debtor] has its remedy against its agent for any improper acts in carrying out the powers.

Thus, according to the Ryan Construction Ltd. decision, where a security agreement grants to the receiver the express power to sell the property secured by the agreement, the receiver will also have the implied power to convey the property as the debtor corporation's attorney provided that the debenture grants such power or authority to the receiver. In the absence of such authority the court has the jurisdiction to perfect the transfer of land.

The court in this case took a literal approach to the deemed agency provision and concluded that the receiver was the agent of the debtor corporation for the purpose of the transfer of land. Consequently if the receiver improperly exercised its express or implied powers relating to the sale of the land the debtor company would have recourse against its agent, the receiver.

Mr. Justice Hope granted an order directing that the new certificate of title be issued in the name of the purchaser free and clear of all encumbrances registered subsequent to the debenture holder's security instrument. At the original hearing of this matter,⁶⁷ however, Master Funduk refused to grant such an order since the receiver, as agent of the debtor corporation, could not pass title which was superior to that held by the debtor corporation.⁶⁸ As can be seen from the following excerpt from his judgment, Mr. Justice Hope did not resolve the issue of the subsequent encumbrances by reference to the agency status of the receiver, but rather, based upon the subsequent encumbrancers' chances for recovery.⁶⁹

While . . . it is not the duty of the court to determine the price at which such a sale should take place, it is the duty of the court (although not approving the sale) to be

satisfied that the price is fair and equitable, having regard to the interests of all parties who may have an interest in the subject property . . . [Since] the sale price exceeds the valuation of the property . . . I am satisfied the receiver is not acting carelessly. Further, it is apparent that the . . . [security holders'] interest under the debenture far exceeds the value of the property, and, in any event, the debenture provides that any excess over the claim of the . . . [security holder] is to go to . . . [the debtor company] and would, of course, be subject to any writ holders (who are stripped off the title by court order).⁷⁰

Alberta Treasury Branches et al. v. Ryan Construction Ltd. then, stands as authority for the proposition that a privately appointed receiver, as agent of the debtor corporation, has the implied power to convey the debtor's property to a purchaser, and that the Court can exercise its discretionary power⁷¹ to permit registration of a new title free and clear of all subsequent encumbrances.

The opposite conclusion was reached by Madame Justice Veit, also of the Alberta Court of Queen's Bench, in Femco Financial Corp. Ltd. v. Femco Ventures Ltd.⁷² In this case the court refused to grant an order directing a conveyance of the debtor corporation's lands to the debenture holder free from all subsequent encumbrances. The application was dismissed primarily for reasons based on the Land Titles Act and legal principles relating to the Torrens system of land registration. The court held that the decision in Alberta Treasury Branches v. Ryan Construction Ltd. did not apply to this case due to the difference in fact situations; namely that Alberta v. Ryan dealt with a conveyance to an independent third party purchaser whereas Femco v. Femco involved a transfer of the debtor's land by the receiver to the debenture holder.

Veit, J. discusses the agency status of the receiver very briefly⁷³ and concludes that where the receiver signs the conveyance as agent of the debtor corporation, the receiver cannot be placed in any better position than would be the debtor. Consequently since the receiver is agent of the debtor it is impossible for the receiver to pass title free and clear of subsequent encumbrances.⁷⁴

A third Alberta decision dealing with this conveyancing problem is Clarkson Co. Ltd. v. Wiebe Holdings Ltd.⁷⁵ which agrees with and follows Mr. Justice Hope's decision in Alberta Treasury Branches v. Ryan Construction Ltd. The court in Clarkson v. Wiebe held that the power to sell granted to a receiver in a debenture is effective and should the receiver act improperly in the conduct of its powers, the debtor company may proceed against its agent, the receiver, for such improper conduct. Thus, there appears to be a literal approach taken once again; namely if the debenture deems the receiver to be the agent of the debtor company, then for the purpose of transferring land to a subsequent purchaser the receiver is in fact acting as agent of the debtor. Clarkson v. Wiebe does not address the subsequent encumbrancers issue which was raised by the two previous decisions.

Relying on the above mentioned cases, Mr. Justice Marshall of the Alberta Court of Queen's Bench has provided "some direction and guidance to assist the registrar [of the land titles office] with respect to some practical problems"⁷⁶ which arise when a receiver sells land and then requests that title be transferred to the purchaser. In the case of Re First Canadian Land Corporation⁷⁷ the court relies upon Alberta Treasury Branches v. Ryan⁷⁸ and Clarkson Co. v. Wiebe Holdings Ltd.⁷⁹ to support

the legal principle that "the power of sale of land by a receiver appointed under a debenture is available in Alberta as an alternative to foreclosure through the courts."⁸⁰ The court then cites Femco Financial Corporation v. Femco Ventures Ltd.⁸¹ as support for the statement that the receiver's power of sale may not, however, "be used where the rights of subsequent encumbrancers are thereby affected."⁸²

These two principles form the foundation for the procedural discussion which follows. In essence, Mr. Justice Marshall has provided a checklist for receivers and the registrar of land titles alike, which is of great assistance when determining whether or not a transfer of land, executed by the receiver, is registerable at the land titles office.

In order for the receiver effectively to execute a transfer of land on the debtor corporation's behalf, there must be a power of attorney in accordance with the Land Titles Act.⁸³ Although it is not necessary for the power of attorney to be in the prescribed form, it is essential that the following elements be clearly identified therein:⁸⁴

1. grantor's identity;
2. act of appointment;
3. description of the reality;
4. identity of the attorney; and
5. means to ascertain and verify the conditions which give rise to the appointment.

In order to satisfy the last element, namely the determination of the validity of the appointment, it is sufficient for the receiver to

attach a statutory declaration exhibiting a certified copy of the receiver's notice of appointment which has been filed at the corporate registry office.⁸⁵ The receiver should also depose in a statutory declaration that default under the debenture has occurred and should state the facts leading up to that default. If the default results only from default in payment, no question of law arises and the registrar can safely deal with the transfer in question.⁸⁶

It is essential that the debtor corporation be given at least seven days notice regarding the sale of its land.⁸⁷

If the debenture does not specify this amount of notice, or [if] the means of establishing service on the debtor are not clear, the registrar should refuse registration of the transfer.

Although the registrar must question the validity of the power of attorney and of the default and notice to the debtor, he need not concern himself with the price which is being paid for the land.⁸⁸

While the adequacy of the consideration obtained in the sale is of great concern to the debtor, I am satisfied . . . that I need not be concerned. The court is not approving the sale, nor, indeed, any actions of a private receiver.

These directions from the Alberta Court of Queen's Bench are most helpful when assessing whether or not the power of attorney contained in a debenture is adequate to permit the transfer of land by the debtor's agent.

Conveyance of the debtor corporation's land by a privately appointed receiver was also in issue in Price Waterhouse Ltd. v. Saskatchewan Economic Development Corp.⁸⁹ The receiver in this case was deemed by the debenture to be the agent of the debtor company. The court does not, however, specifically comment upon the receiver's agency

status in granting an order which directed the Registrar of Land Titles to register a transfer of the debtor corporation's lands, to the subsequent purchaser.

The court held that s. 91 of the Saskatchewan Business Corporations Act actually precludes the debtor corporation from executing the transfer:⁹⁰

If a receiver-manager is appointed by a court or under an instrument, the powers of the directors of the corporation that the receiver-manager is authorized to exercise may not be exercised by the directors until the receiver-manager is discharged.

Thus when a receiver is granted the power to sell the debtor's assets it is the receiver, and not the debtor corporation, which alone has the power to execute the transfer to effect that sale. However, because the receiver is not the registered owner of the land, he lacks the authority to confer title on a subsequent purchaser. A court order is required to achieve the actual transfer of land. In this case Mr. Justice Gerein held that it was in the best interest of all interested parties that the proposed sale be concluded, and in the absence of a power of attorney in the debenture allowing the receiver to execute the transfer as the debtor's attorney, he ordered that the appropriate transfer, executed by the receiver, be registered at the Land Titles Office.

Interestingly, when considering the receiver's ability to transfer title to the debtor corporation's property, the perspective of the court regarding the agency status of the privately appointed receiver seems to depend upon what issue is being considered. Diegel & Feick Inc. v. Donia Consulting Corp.⁹¹ held that the privately appointed receiver is

the agent of the debenture holder when selling the assets of the debtor corporation. This enables the receiver to pass title, which is clear of subsequent encumbrances, to third parties. The balance of the cases, however specifically consider the technical ability of the privately appointed receiver to convey the debtor's real property and all of them hold that the receiver is the agent of the debtor corporation. Although Femco Financial Corp. Ltd. v. Femco Ventures Ltd.⁹² states that since the receiver is the agent of the debtor corporation he can not convey clear title to third parties, Alberta Treasury Branches v. Ryan Construction Ltd.⁹³ did not concern itself with this issue due to the reality that none of the other creditors had any hope of financial recovery given the facts of that particular case. It is also interesting to note that the cases which conclude that the receiver can convey title to the debtor's property as agent of the debtor conflict with the two hat analysis of the Ontario Court of Appeal in Peat Marwick v. Consumers' Gas Co.,⁹⁴ which states that when the receiver is realizing the security of the debenture holder, i.e. gathering in and selling the assets, he is acting as agent of the creditor.

6. Status of the Receiver in a Court Action

The status of the privately appointed receiver as it relates to the issue of entitlement to representation in a court action also bears on the question of whose agent is the privately appointed receiver. In particular, in the standard deemed agency situation, are the receiver and debtor corporation each entitled to separate legal representation in a court action? If the receiver is the agent of the debtor company, the

receiver and the debtor corporation are associated entities which do not have an independent status. Arguably, therefore, they should not be entitled to separate counsel.

This argument was not accepted in Prairie Roadbuilders Ltd. v. County of Stettler.⁹⁵ Rather, Master Funduk held in that case that the debtor corporation was separate from the receiver and thus each was entitled to separate representation in a mechanics lien application. He based his conclusion on an assumption that the debenture pursuant to which the receiver was privately appointed contained the usual deemed agency provision whereby the receiver was deemed to be the agent of the debtor. This assumption was necessary due to the fact that the debenture in question was not in evidence before the court in the mechanics lien application. Master Funduk held that notwithstanding the existence of a deemed agency clause, it is necessary to look at the "real function" being performed by the receiver. As stated in this judgment:⁹⁶

In recent years there has been a judicial trend away from treating a receiver as agent for the debtor. The receiver is usually, by the terms of the debenture, deemed the agent of the debtor. However, the modern judicial trend is to give cognizance to the reality being that the agency is for the purpose of allowing the receiver to run the business, incur liabilities on behalf of the business, and most important to be able to pass good title to assets sold. The receiver's real function is to realize on the security on behalf of the creditor. Roynat Ltd. v. Denis, Re Paradise Gardens Ltd.

Thus Master Funduk concluded that the receiver should be considered to be the agent of the security holder based in part upon principles of law stated in Roynat Ltd. v. Denis. As indicated supra⁹⁷

the decision of the Saskatchewan Court of Appeal in Roynat Ltd. is open to question because of the argument that the court intended in Roynat Ltd. v. Denis to hold that the receiver is agent of the mortgagor, or debtor corporation, rather than the mortgagee, security holder. On this basis it would appear that Prairie Roadbuilders Ltd. v. County of Stettler is also of questionable authority for the proposition that the privately appointed receiver is agent of the mortgagee, security holder.

7. Receiver's Liability to Third Parties

Often, during the management phase of the receivership process, goods and services are supplied to, and various contracts are entered into by the privately appointed receiver. In this situation, who is ultimately responsible for the payment of these trade debts which have been incurred by the receiver? According to Frank Bennett in his textbook Receiverships, "if the receiver has not contracted in his personal capacity, trade debts"⁹⁸ will be paid from the proceeds of the realization of the debtor's assets, and will rank in priority to the interest of the security holder. Once⁹⁹

the debt to the security holder has been retired, surplus proceeds are then distributed to [the debtor corporation's] subordinate secured creditors and execution creditors before payment to the debtor.

In other words, out of the monies realized from the liquidation of the debtor's assets, the new trade debts will be paid first, following which, the receiver will pay the interest and principal which remains outstanding on the secured party's loan agreement. If any money remains in the receiver's hands following payment to the security holder, the

receiver must then distribute the excess funds to any subordinate secured and execution creditors of the debtor corporation.

Assuming that this is a correct ranking of the distribution of proceeds in a receivership setting, it seems that it is the secured party who is ultimately responsible for the payment of the trade debts which are incurred during the course of the receivership. This is so because the amount of money which is paid to the secured party in satisfaction of the principal and interest outstanding under its security instrument is reduced by the funds which the receiver must first pay out to the receivership trade creditors. If the security holder is indirectly responsible for the payment of these trade debts, it is possible to argue that when the receiver manages the debtor corporation's business, and in so doing incurs trade debts, he is acting as the agent of the secured party.

In the alternative, the payment of trade creditors in priority to the secured creditor may merely be a practical solution to the problem that would arise if post receivership debts were left unpaid. Trade creditors would quickly withhold goods and services if they perceived any risk regarding payment therefore. The withholding of such goods and services would bring the management phase of the receivership to a standstill and would not be in the best interests of either the security holder or the debtor corporation. Arguably, therefore, the receiver remains the agent of the debtor corporation during the management phase, notwithstanding the practice of paying trade creditors in priority to the secured party. This result would be consistent with the two hat theory expressed in Peat Marwick Ltd. v. Consumers' Gas Co.¹⁰⁰ On the

other hand, a finding that the receiver, while managing the debtor's business, is acting as the agent of the security holder, is inconsistent with Peat Marwick Ltd. v. Consumers' Gas Co. Furthermore, it is also contrary to the findings of the English courts on this issue.¹⁰¹ In the past, the English courts have held that the receiver is the agent of the debtor corporation, with the result that trade creditors must look directly towards the debtor corporation for payment of the debts in question. Due to amendments contained in the Insolvency Act (1986), however, trade creditors in England can now recover from the receiver personally (see VI. B. 2. infra).

8. Receiver as Agent Pursuant to the Personal Property Security Act

In Alberta, the proposed Personal Property Security Act¹⁰² (P.P.S.A.) does not prohibit the use of deemed agency clauses in security agreements, and currently, the use of deemed agency clauses in other P.P.S.A. jurisdictions is not uncommon. Consequently, the issue of whose agent is the privately appointed receiver remains of importance in those jurisdictions which have enacted Personal Property Security legislation.

The agency status of the privately appointed receiver does, however, take on an added dimension and is of great significance in P.P.S.A. jurisdictions, due to the provisions in the legislation which permit the secured party to perfect its interest in the security by way of possession of the goods which are charged by the security agreement.

Pursuant to the provisions of Personal Property Security legislation, the secured party may perfect its interest in the goods in question by registration of its security agreement, by the secured party taking possession of the goods, or through the use of one of the temporary perfection rules which are contained in the Act. Perfection by way of possession is of significance when analysing the agency status of the privately appointed receiver.

Section 24 of the proposed Alberta P.P.S.A.¹⁰³ provides that "possession of the collateral by the secured party, or on his behalf perfects a security interest". If the collateral is in the possession of the receiver it is vitally important to determine who the receiver is acting for: if the receiver is the agent of the secured party, the security interest has been perfected and is enforceable against third parties. If, however, the receiver is the agent of the debtor corporation (as would be the case in a deemed agency situation), the security interest has not been perfected and is subordinate to certain third parties.¹⁰⁴

Determination of the agency status of the privately appointed receiver, as it relates to the perfection of the secured party's security interest, was discussed by the Ontario Court of Appeal in Sperry Inc. v. Canadian Imperial Bank of Commerce¹⁰⁵ and in Saskatchewan by both the Court of Queen's Bench and the Court of Appeal in Bank of Nova Scotia v. Royal Bank of Canada.¹⁰⁶ These courts reached opposite conclusions regarding the agency status of the privately appointed receiver.

In Sperry Inc. v. C.I.B.C., the debtor corporation executed a dealer agreement with Sperry Inc., whereby the debtor granted a security interest in all of its present and after acquired property, including inventory, to Sperry Inc. Subsequently the debtor corporation granted a security interest to the C.I.B.C. in all of its present and after acquired property, including inventory. When the debtor corporation defaulted in its payments to the C.I.B.C., the bank appointed a receiver-manager who then took possession of the property and assets of the debtor corporation.

The primary issue for determination by the court was which party, Sperry Inc., or the C.I.B.C., had priority to the debtor's collateral. At the time when the receiver was appointed, neither security agreement was validly registered. The court, therefore, had to consider whether or not the security interest had been perfected by some means other than by registration. In particular, the Ontario Court of Appeal was faced with the issue of whether the C.I.B.C. had perfected its interest in the property by possession through its agent, the receiver-manager.

In order to succeed with this argument, the C.I.B.C. had to establish that the receiver was acting as the agent of the C.I.B.C., and not as the agent of Sperry Inc. The security agreement in question contained a deemed agency clause which deemed the receiver to be the agent of the debtor corporation. Despite the existence of this deemed agency clause, the bank argued that the receiver was acting as the agent of the C.I.B.C. based upon the two hat theory expounded by Peat Marwick v. Consumers' Gas Co.¹⁰⁷ which stated that notwithstanding the deemed agency clause, when the receiver is realizing upon the security of the

debenture holder, the receiver is acting as the agent of the debenture holder.

The Ontario Court of Appeal, in Sperry Inc. v. C.I.B.C. held that on the facts of this case the receiver had only evidenced an intention to realize on the assets of the debtor corporation but had not actually implemented that intention and realized upon the debtor's security.¹⁰⁸ Since the receiver had not realized upon the security holder's collateral, the literal interpretation of the deemed agency clause was not displaced, with the result that the receiver was acting as the agent of the debtor corporation and was not acting as the agent of the secured party. Consequently, the secured party, C.I.B.C., had not perfected its interest in the secured property by means of possession by its agent.

The issue of perfection of the secured party's interest by way of the possession of the collateral by the secured party's agent was also raised in the case of Bank of Nova Scotia v. Royal Bank.¹⁰⁹ Although the trial court in this case held that the Royal Bank had perfected its security interest both by means of registration, and by means of possession of the collateral by its agent, the receiver, the Court of Appeal reversed this decision and held that repossession of the collateral does not constitute perfection by possession.

In Bank of Nova Scotia v. Royal Bank, the debtor corporation granted a security interest to the Royal Bank in all of its present and after acquired property on June 3, 1981. On June 11, 1981, this security agreement was registered. Subsequently, (April 9, 1984), the debtor purchased two trucks which were secured by conditional sales

contracts [sic]. These security agreements were subsequently assigned to the Bank of Nova Scotia. The Royal Bank appointed a receiver pursuant to its security agreement of January 8, 1985, and the Bank of Nova Scotia then registered an interest in the trucks (by specific reference to their serial numbers) on January 21, 1985. The receiver subsequently sold the trucks in question and the Bank of Nova Scotia commenced this action against the Royal Bank claiming priority to the proceeds from the sale of the trucks.

The Bank of Nova Scotia claimed priority to the funds based on the following grounds:

1. the Royal Bank's security agreement was not registered in the proper form because of the fact that it did not contain a description of the trucks by serial number. The absence of the serial numbers rendered the registration invalid with the result that the Bank of Nova Scotia's registration took priority; and
2. the receiver was acting as the agent of the debtor corporation, pursuant to the deemed agency clause contained in the security agreement and thus possession of the trucks by the receiver did not perfect the security interest of the Royal Bank.

In dealing with the first argument, the trial court held that the Personal Property Security Act did not require the registration of after acquired property by serial number. Since the Royal Bank had complied with the requirements of the Act, the registration of its security interest was valid.

Despite this finding of a valid registration of the secured party's interest, the trial court went on to discuss the second issue,

namely perfection of the secured party's interest by possession of the collateral through its agent. Although the security agreement in question contained a clause which deemed the receiver to be the agent of the debtor corporation, the court held that notwithstanding the existence of this deemed agency clause, the receiver was acting as the agent of the secured party. In order to reach this conclusion, the court distinguished the facts of this case from the facts in Peat Marwick v. Consumers' Gas Co. in the following manner:¹¹⁰

The Peat Marwick Ltd. v. Consumers' Gas Co. case can be distinguished on the basis of the difference in wording of the debenture. The provision contained in the debenture in the Peat Marwick Ltd. v. Consumers' Gas Co. case contained the unqualified words, "for all purposes deemed to be the agent of the company" whereas the debenture in this application contains the qualified words, "any such Receiver shall, so far as concerns responsibility for his acts, be deemed the agent of the company."

Mr. Justice Osborn of the Saskatchewan Court of Queen's Bench then held:¹¹¹

In this case, the receiver-manager is the agent for the Royal Bank, the debenture holder, for the purposes of taking possession of the goods of the debtor. It is only the agent of the company so far as concerns responsibility for its acts. On the date the receiver-manager took possession of the trucks, it did so as agent for the Royal Bank.

The trial court then specifically states that the Royal Bank had perfected its security interest in the trucks by registration of the security agreement on June 11, 1981. Implicit in the above discussion of the agency status of the receiver is that the Royal Bank also perfected its security interest through the possession of its agent, the receiver-manager.

Mr. Justice Osborn concludes that the receiver is the agent of the secured party by distinguishing the facts in Bank of Nova Scotia v. Royal Bank from the facts in Peat Marwick Ltd. v. Consumers' Gas Co. It is submitted that it would have been possible to reach the same conclusion by relying upon the two hat theory expounded by Peat Marwick Ltd. v. Consumers' Gas Co. rather than by distinguishing the wording of the deemed agency clauses in each case.

As discussed supra,¹¹² Peat Marwick Ltd. v. Consumers' Gas Co.¹¹³ is authority for the proposition that a privately appointed receiver may act as the agent of either the secured party or the debtor corporation, depending upon the function which he happens to be carrying out. If the receiver is carrying on the business, and acting in his role as manager, he will be viewed as acting as the agent of the debtor corporation. If, on the other hand, the receiver is realizing on the security of the security holder, he will be viewed as acting as the agent of the secured party.

In Bank of Nova Scotia v. Royal Bank, the receiver sold two trucks, the proceeds of which sale were the subject of the priority dispute in question. Arguably, in selling these trucks the receiver was attempting to realize upon the security agreement of the Royal Bank. If so, according to Peat Marwick Ltd. v. Consumers' Gas Co., the receiver was acting as the agent of the secured party, the Royal Bank, and thus pursuant to the provisions of the P.P.S.A., the receiver perfected the Royal Bank's interest by way of possession.

It would appear, however, that an argument such as that expressed above is no longer available in Saskatchewan, due to the judgment of the

Saskatchewan Court of Appeal in Bank of Nova Scotia v. Royal Bank,¹¹⁴ which stated that repossession of the secured property does not amount to perfection of the security holder's interest by possession.¹¹⁵

Possession as used in s. 24 means actual physical possession of the collateral to secure payments, to prevent the debtor from dealing with the collateral, and to provide notice to third parties of its interest. It is not the taking of possession on default. Perfection and repossession are not synonymous terms. Repossession is not possession to secure or guarantee the payment or performance of an obligation, and therefore does not satisfy the . . . requirement necessary to perfect the security.

The Court of Appeal does not resolve the perfection issue in this case on the basis of whom the privately appointed receiver is acting for, as did the Court of Queen's Bench. Rather, the appellate court bases its decision on the definition of "possession" and an interpretation of how this term is used in the Act. Based on the Court of Appeal's decision in Bank of Nova Scotia v. Royal Bank, it would appear that the statements made or implied by the Court of Queen's Bench regarding the agency status of the privately appointed receiver are now of limited value in Saskatchewan.

From this discussion, it is apparent that the interpretation of deemed agency clauses is, and will continue to be, of great importance in Personal Property Security Act jurisdictions. It is interesting to note that in both of the cases analysed herein, the principles and tests enunciated by Peat Marwick Ltd. v. Consumers' Gas Co. were applied in order to determine for whom the privately appointed receiver was acting. Once the agency status of the receiver was identified, the perfection by

possession rules from the P.P.S.A. were applied to the facts in question. The ability to determine who is the principal of the privately appointed receiver, therefore, remains of great significance both in those jurisdictions which have enacted Personal Property Security legislation, and in those which have not.

9. Receiver as Officer of the Debtor Corporation

The preceding discussions have centered upon the issue of whose agent is the privately appointed receiver. Due to legislative enactments contained in the British Columbia Company Act,¹¹⁶ the agency status of the receiver is not of importance in British Columbia. Rather, s. 112 of this Act deems the receiver who is privately appointed to be an officer of the debtor corporation:

(1) Every receiver or a receiver manager appointed under an instrument is an officer of the corporation and not an agent of the persons by, or on whose behalf, he is appointed, and he shall act in accordance with the instrument under which he is appointed and any directions of the court made under section 115.

Sections 113 and 142 of the Company Act further impose a fiduciary duty upon the instrument appointed receiver as if he were a director of the debtor corporation. As such the receiver is obliged to "act honestly and in good faith and in the best interests of the company; and exercise the care, diligence and skill of a reasonably prudent person."¹¹⁷ Thus, in British Columbia, a privately appointed receiver is an officer of the debtor corporation and not an agent.

The provisions of s. 112 of the Company Act (B.C.) have been the subject of judicial interpretation in Attorney General of Canada v.

Banque Nationale De Paris (Canada)¹¹⁸ and in Henfrey Samson Belair Ltd. v. Attorney General for the Province of British Columbia.¹¹⁹

The liability of the debenture holder to pay certain taxes imposed by the Excise Tax Act was in issue in the A.G. of Canada v. Banque Nationale De Paris (Canada) case. In this case the debtor corporation operated a business which imported pipe into Canada. The defendant bank appointed a receiver manager who subsequently sold the debtor's inventory of pipe to three wholesalers, two of whom operated in the United States of America. The B.C. Attorney General then commenced an action against the bank, debenture holder, to recover certain excise taxes with respect to the sale of the pipe. The Attorney General argued in this action that the debenture holder should be liable for the actions of the receiver, on the basis that the receiver was acting as the debenture holder's agent. This argument was dismissed by the British Columbia Supreme Court on the following basis:¹²⁰

By the provisions of s. 112 of the Company Act R.S.B.C. 1979, c. 59, the receiver-manager is an officer of . . . [the debtor corporation], not an agent of the debenture holder as he was formerly at Common Law. By s. 113 of the same Act, the receiver-manager stands in a fiduciary relationship to . . . [the debtor corporation]. Thus . . . the obligation of the receiver-manager is to sell in the best interest of . . . [the debtor corporation] and to pay the proceeds to the debenture holder to reduce the indebtedness of the company. The debenture holder has a first charge on the proceeds as a beneficiary of a specific equitable charge on the pipe, but at no time did the debenture holder require [sic; quære whether this should be acquire] the right to sell the pipe directly or by agent.¹²¹

Since the receiver was acting as an officer of the debtor corporation, presumably the Attorney General could look only to the debtor for payment of the outstanding excise taxes.¹²² The court

implies, however, that in any jurisdiction in Canada, other than the Province of British Columbia, the debenture holder would be liable for the payment of the taxes in question. In the absence of a deemed agency clause in other Canadian jurisdictions the debenture holder is considered to be the receiver's principal, and thus would be liable for payment of the taxes in question. If a deemed agency clause was present in the debenture, it would be necessary to examine the facts in question in order to determine which party the receiver was acting for. The receiver's principal would then be liable for his actions.

Clearly, according to Attorney General of Canada v. Banque Nationale De Paris (Canada)¹²³ in British Columbia the receiver is to be regarded as an officer of the debtor corporation and not as an agent of either the debtor company or the debenture holder. The extent of a receiver's liability as officer of the debtor company was considered in Henfrey Samson Belair Ltd. v. Attorney General for the Province of British Columbia.¹²⁴

In Henfrey Samson Belair Ltd. a claim was made against the privately appointed receiver for the payment of unpaid wages which came due to the employees of the debtor corporation prior to the appointment of the receiver. The claim was based on the provisions of the Company Act¹²⁵ which transform the receiver into an officer of the debtor company, and on the provisions of the Employment Standards Act¹²⁶ which indicate that an officer of a corporation is personally liable for the unpaid wages owing to the corporation's employees.

The British Columbia Supreme Court analyzed the relevant provisions contained in each Act and concluded that the legislature did not intend to impose such personal liability upon a receiver. The court then dismissed the application by stating that the receiver¹²⁷

is not personally liable under the Employment Standards Act for unpaid wages of an employee of the corporation which became due and owing prior to the appointment of the receiver or receiver-manager.

By legislative enactments contained in the Company Act, the status of a receiver in British Columbia is clearly different from the status of a receiver in the other Canadian jurisdictions. This special fiduciary position which has been occupied by privately appointed receivers in British Columbia has recently been repealed by British Columbia's Personal Property Security Act,¹²⁸ which received third reading on June 15, 1989, and which will come into force by regulation of the Lieutenant Governor in Council.¹²⁹ This repeal of the receiver as an officer of the debtor corporation provisions in the Company Act was undertaken in order to bring the law in British Columbia in line with the law of other common law jurisdictions in Canada.¹³⁰

10. Conclusions to be Drawn Based on Canadian Jurisprudence

The most frequently cited Canadian authority which deals with the agency status of the privately appointed receiver is Peat Marwick Ltd. v. Consumers' Gas Co.¹³¹ (Peat Marwick v. Consumers' Gas) which held that the receiver may wear two hats and that his true status as agent is dependent upon which hat he is wearing, or in other words, which function he happens to be carrying out.

- If the receiver is realizing on the assets and security of the debenture holder, he is functioning as a receiver and is seen to be the agent of the debenture holder.
- If the receiver is in possession of the debtor corporation's premises and carrying on the business of the debtor, he is functioning as a manager and is seen to be the agent of the debtor corporation.

In order to determine whether Canadian jurisprudence in fact follows the two-hat test enunciated by Peat Marwick v. Consumers' Gas, it is necessary to analyse the function which the receiver is performing in each case, and then to determine if the outcome is consistent with the Peat Marwick decision. This analysis is not always easy to conduct due to the occasional lack of information contained in the judgments regarding the specific function of the receiver. With that caveat in mind, it is possible to analyse briefly the cases which have been discussed herein.

a. Summary of Canadian Jurisprudence

Ostrander v. Niagara Helicopters Ltd. (1973)¹³²

- The debtor's major shareholder has objected to the sale of the business by the receiver.
- Held: In carrying on the business of the company pending sale, the receiver acts as the agent for the lender.
- If the court's comments are directed towards the aspect of the sale of the business, then the case is consistent with Peat

Marwick v. Consumers' Gas which holds that the receiver, when wearing his receivership hat, is the agent of the debenture holder.

- Alternatively, if these comments are primarily directed towards the element of carrying on the business of the debtor, then the case is contrary to Peat Marwick v. Consumers' Gas; when wearing his managerial hat, the receiver is the agent of the debtor corporation.
- Peat Marwick v. Consumers' Gas merely restricts this decision by holding that Ostrander is not authority for the proposition that the receiver is the agent of the debenture holder for all purposes.

Re Paradise Gardens Restaurant v. Federal Business Development Bank
(1982) 133

- Receiver accepted an offer for the sale of the debtor corporation's restaurant and is therefore wearing his "receiver's hat".
- Held: The receiver is acting as the agent of the debenture holder.
- This judgment specifically relies upon and is consistent with Peat Marwick v. Consumers' Gas.

Roynat Ltd. v. Denis (1982) 134

- Receiver has operated the debtor's business and advertised the business for sale, and is therefore functioning as a manager.

- Held: The receiver is the agent of the mortgagee (debenture holder).
- Although this case specifically relies upon Peat Marwick v. Consumers' Gas, it reaches the opposite conclusion.
- Arguably, the court intended to hold that the receiver is the agent of the mortgagor (debtor corporation) and therefore, Roynat Ltd. v. Denis is not a reliable authority.

*U.F.C.W. v. National Bank (1983) 135

- Receiver hired the debtor corporation's employees to assist with winding-down the company's business affairs, but did not deduct or remit union dues as required by the collective agreement.
- Held: The receiver is the agent of the debtor corporation, pursuant to the deemed agency clause and as such is liable in his own right, independently of the liability of his principal (based on the provisions of the Labour Relations Act). Receiver is personally liable for the payment of union dues.
- The Board took a literal approach to the interpretation of the deemed agency clause and made no attempt to apply Peat Marwick v. Consumers' Gas.
- Arguably, hiring employees, even while winding down the company's affairs, is an act of management prior to realization, and therefore this decision does not conflict with Peat Marwick v. Consumers' Gas.

*R. v. Coopers & Lybrand Ltd. (1980)¹³⁶

- In the course of continuing the operation of the debtor corporation's business, the receiver employed the debtor's existing employees. He did not, however deduct or remit income taxes from their wages.
- Receiver is performing his managerial function.
- Held: A deemed agency clause is not to be interpreted literally in all cases or for all purposes. Although the receiver went into possession of the debtor's property in order to realize that property for the benefit of the secured party, he personally paid the wages to the employees and he is therefore personally liable for his failure to make deductions for income tax purposes.
- Case is consistent with Peat Marwick v. Consumers' Gas insofar as it accepts that the receiver's true function must be analysed, and that deemed agency clauses are not to be interpreted literally.

*Roche v. The Battery Ltd. (1985)¹³⁷

- Receiver in carrying on the debtor's business, terminated all of the debtor's employees' contracts of employment and rehired the plaintiff for a short period of time. Plaintiff now claims entitlement to severance notice based upon his lengthy record of employment with the debtor corporation.
- Receiver is wearing his managerial hat.
- Held: To determine the receiver's status, one must first examine his function. If he is acting as a manager, he is the agent of the debtor corporation; when acting as a receiver, he is the agent

of the security holder; and when acting in his own right, the receiver is functioning as a principal. The receiver rehired the plaintiff in his own right and consequently this employment contract is separate from the one which existed between the plaintiff and the debtor corporation.

- Discussion is consistent with Peat Marwick v. Consumers' Gas, except that the court adds a third hat, namely that the receiver may be acting in his own right.

*Note that there seems to be a tendency in employment law cases to find personal liability on the part of the receiver. Could this be an attempt to provide minimal benefits to employees who might have no other recourse against their financially defunct employer? Alternatively, do these cases simply support the third position enunciated in Roche v. The Battery — i.e. that in employment matters, the receiver is acting in his own right?

Diegel & Feick Inc. v. Donia Consulting Corp. (1980)¹³⁸

- Does the sale of the debtor's business by the receiver defeat the interests of subsequent encumbrancers?
- In selling the business, the receiver is acting as a receiver.
- Held: Notwithstanding the existence of a deemed agency clause, when selling the debtor corporation's assets, the receiver is

acting as the agent of the security holder. This enables the receiver to pass title which is clear of subsequent encumbrances.

- The outcome of this case is consistent with Peat Marwick v. Consumers' Gas.

Alberta Treasury Branches v. Ryan Construction Ltd. (1983), Femco Financial Corp. Ltd. v. Femco Ventures Ltd. (1983), Clarkson Co. Ltd. v. Wiebe Holdings Ltd. (1983)¹³⁹

- Each case deals with the capacity of the receiver to convey title to real property in a Torrens jurisdiction. In so doing the receiver would be functioning as a receiver, that is, selling the debtor's assets and realizing on the security.
- Held: The receiver is the agent of the debtor corporation.
- These decisions are contrary to Peat Marwick v. Consumers' Gas.

Prairie Roadbuilders Ltd. v. County of Stettler (1983)¹⁴⁰

- Receiver is appearing as a party in a mechanics lien application, and thus must be functioning as a manager.
- Held: The real function of the receiver is to realize the security on behalf of the creditor. This implies that the receiver is acting as the agent of the debenture holder.
- This result would be inconsistent with Peat Marwick v. Consumers' Gas, which held that while managing the debtor's business the receiver acts as the agent of the debtor corporation.

Sperry Inc. v. Canadian Imperial Bank of Commerce (1985)¹⁴¹

- The receiver took possession of the debtor corporation's assets with the intention of liquidating same, but had not yet sold the debtor's assets.
- Held: Although the receiver had evidenced an intention to realize on the debtor's assets, the security had not actually been realized, consequently the literal interpretation of the deemed agency clause was not displaced. Receiver acting as the agent of the debtor corporation.
- The court expressly applied Peat Marwick v. Consumers' Gas and the result is consistent therewith.

Bank of Nova Scotia v. Royal Bank (Q.B., 1986; C.A., 1987)¹⁴²

- Receiver sold some of the assets of the debtor corporation. Function of the receiver in so doing is not made clear by the judgment: if the sales were concluded during the normal course of the debtor's business, then the receiver would be functioning as a manager; if the sales were made in order to realize on the debtor's security, the receiver is exercising his receivership functions.
- Held: Pursuant to the trial judgment, the receiver here is the agent of the debenture holder due to the distinction between the wording of this deemed agency clause and the clause in Peat Marwick v. Consumers' Gas. Note, however, that the subsequent

CHART I: "TWO-HAT" THEORY ANALYSIS OF CANADIAN JURISPRUDENCE

Consistent or Do Not Conflict with Peat Marwick v. Consumers' Gas

Re Paradise Gardens Restaurant
R. v. Coopers & Lybrand
Roche v. The Battery Ltd.
Diegel & Feick Inc. v. Donia Consulting Corp.
U.F.C.W. v. National Bank
Sperry Inc. v. C.I.B.C.

Support a Third Position: Receiver Acting in his Own Right

Roche v. The Battery Ltd.
R. v. Coopers & Lybrand
U.F.C.W. v. National Bank

Contrary to Peat Marwick v. Consumers' Gas

Alberta Treasury Branches v. Ryan Construction Ltd.
Femco Financial Corp. Ltd. v. Femco Ventures Ltd.
Clarkson Co. Ltd. v. Wiebe Holdings Ltd.

Contrary to Peat Marwick v. Consumers' Gas, but Unreliable

Roynat Ltd. v. Denis
Prairie Roadbuilders Ltd. v. County of Stettler

Ambiguous Result

Ostrander v. Niagara Helicopters Ltd.

Peat Marwick v. Consumers' Gas Distinguished

Bank of Nova Scotia v. Royal Bank

reversal of this decision by the Court of Appeal, renders the trial decision of limited value.

b. Dominant Canadian Theory

As is apparent from the case listing contained in Chart I, supra, the majority of Canadian cases which discuss whose agent is the privately appointed receiver, are either consistent with or do not conflict with Peat Marwick v. Consumers' Gas. Those cases which are clearly contrary to Peat Marwick v. Consumers' Gas present a solution to a very specific and specialized conveyancing problem which exists in those jurisdictions which have a Torrens system of land registration. It is submitted that Roynat Ltd. v. Denis and Prairie Roadbuilders Ltd. v. County of Stettler should be disregarded as being unreliable for the principles enunciated therein. It is further submitted that although the final interpretation of Niagara Helicopters Ltd. may be ambiguous, the willingness of the court to approach the deemed agency clause in a non-literal manner illustrates support for the subsequent Peat Marwick v. Consumers' Gas decision.

The "two-hat" theory analysis of Canadian jurisprudence contained in Chart I does not include a specific reference to the issue of the receiver's liability to third parties, particularly in the area of trade debts. As discussed in section VI. A. 7. supra the Canadian position regarding payment of trade creditors, as enunciated in a leading Canadian textbook on receivership law, is contrary to the Peat Marwick v. Consumers' Gas theory. It is difficult to rationalize these opposing positions. Although not completely clear from the textual material

relied upon, possibly, the statements regarding the priority ranking of trade creditors should be limited to the situation of a court appointed receiver, and thus are not applicable to a privately appointed receiver. Alternatively, statements which indicate that trade creditors are guaranteed payment of the debts which are incurred by the receiver while managing the debtor's business may simply be an acknowledgment of the fact that in practice, trade creditors would soon refuse to supply goods to and to deal with receivers if there was a risk that the creditors' accounts would not be paid. It may be that during this management phase the debtor corporation is really the principal of the receiver, but that the secured party has by implication subrogated its claim to that of the trade creditors. This would assure a continued supply of goods and services to the receiver and would permit a smoother operation of the receivership process -- all of which are ultimately in the best interests of the debtor corporation and the secured party alike. If this argument is correct, there is no conflict between the Peat Marwick v. Consumers' Gas two hat theory, and the Canadian practice of paying trade creditors in priority to the secured party. If a conflict between these positions does remain, it is submitted that the payment of trade debts deviation from the two hat theory is insufficient, in and of itself, to topple the theory which the majority of Canadian cases support.

Based on this analysis one must conclude that the dominant theory of law in Canada relating to the agency status of the privately

appointed receiver is the two-hat theory which was enunciated by the Ontario Court of Appeal in Peat Marwick v. Consumers' Gas,¹⁴³ namely:

Notwithstanding the existence of a deemed agency clause, the receiver acts as the agent of either the debenture holder or the debtor corporation, depending upon what function the receiver happens to be fulfilling.

If the receiver is conducting himself as a receiver, i.e. realizing upon the security of the debtor, he is properly seen to be the agent of the debenture holder.

However, if the receiver is conducting himself as a manager, i.e. occupying the debtor's premises and managing the debtor's business, he is properly seen to be the agent of the debtor corporation.

Having analysed the Canadian jurisprudence, it is now informative to examine the English jurisprudence in this area and thereby determine whether or not the English common law has developed in such a way as to provide a basis for this Canadian two-hat theory.

B. ANALYSIS OF ENGLISH JURISPRUDENCE

1. Introduction

In determining the issue of whose agent is the privately appointed

receiver, The Canadian courts have developed and applied the "two hat" theory first enunciated in Peat Marwick Ltd. v. Consumers' Gas Co.¹⁴⁴ Is this dual agency theory uniquely Canadian, or is it based, as are so many of our legal theories and principles, upon the English common law? A Canadian text dealing with the topic of receivership law indicates that "this 'double agency' is a peculiar form of agency at common law."¹⁴⁵ The text does not, however, provide express support or an analysis of how this peculiar form of agency relationship has been developed by the common law.

By a careful analysis of the English jurisprudence in this area, it should be possible to determine whether or not the English common law supports the development of this peculiar dual agency status on the part of the privately appointed receiver.

2. Receiver's Liability to Third Parties

A number of English decisions have considered the agency status of the privately appointed receiver while determining whether or not the receiver is liable to third parties for goods ordered by the receiver during the course of managing the debtor corporation's business. The Canadian two hat theory would consider the receiver in this situation to be acting as the agent of the debtor company. How have the English courts characterized the situation?

In Cox v. Hickman¹⁴⁶ the House of Lords discussed the agency status of trustees who were given the power to manage the debtor company's debts. In this case, a number of unsecured creditors made arrangements voluntarily and jointly with the debtor for the repayment

of debts due to them. Pursuant to the Deed of Arrangement appointing the trustees, the trustees were given power to carry on the debtor's business and to pay the net income arising therefrom to the creditors. The creditors were also given control over the method of conducting the debtor's business. When all of the debts due to the creditors had been repaid, the trustees were, by agreement, to return the business, property and management to the debtor.

Unfortunately, the debtor's business did not flourish in the hands of the trustees, with the result that the trustees were unable to pay for all of the goods and services which had been supplied. The basis of the lawsuit in Cox v. Hickman was the suppliers' claim that the creditors were liable to pay for the goods and services supplied to the trustees. The majority of the House of Lords held, however, that there was no such liability on the part of the creditors, since the trustees were not acting as the agents of the creditors.

Lord Cranworth clearly states in this decision that the trustees are not the agents of the creditors even though the creditors could control the conduct and management of the debtor's business. As stated by Lord Cranworth:¹⁴⁷

The mere concurrence of creditors in an arrangement under which they permit their debtor or trustees for their debtor, to continue his trade, applying the profits in discharge of their demands, does not make them partners with their debtor, or the trustees. The debtor is still the person solely interested in the profits save only that he has mortgaged them to his creditors. He receives the benefits of the profits as they accrue, though he has precluded himself from applying them to any other purpose than the discharge of his debts. The trade is not carried on by or on account of his creditors; though their consent is necessary in such a case, for without it all the property

might be seized by them in execution. But the trade still remains the trade of the debtor or his trustees; the debtor or the trustees are the persons by or on behalf of whom it is carried on.

The facts in Cox v. Hickman are analogous to the situation where a debenture deems the receiver to be acting as the agent of the debtor corporation. Applying Cox v. Hickman to such a debenture, one could conclude that the receiver should not be seen as the agent of the debenture holder despite the fact that pursuant to the terms of the debenture the debenture holder can exercise great powers of control over the receiver's activities and over the receiver's management of the debtor corporation.

Cox v. Hickman was subsequently applied to a debenture by the House of Lords in the landmark case of Gosling v. Gaskell.¹⁴⁸ In Gosling v. Gaskell, the debtor corporation mortgaged its assets to trustees who acted on behalf of several debenture holders to secure the payment of the debenture. Upon default in payment, the trustees appointed a receiver to carry on the business of the company. Pursuant to the terms of the deed, the receiver was the agent of the debtor corporation, and the debtor was solely responsible for the receiver's acts and defaults. Following the appointment of the receiver, the company was compulsorily wound up. Notwithstanding the winding up order, the receiver continued to operate the business and in so doing ordered goods from the plaintiff.

The plaintiff then commenced action against the trustees for the price of the goods, arguing that the trustees (and ultimately the debenture holders) were liable as the true principals of the receiver.

The House of Lords in Gosling v. Gaskell,¹⁴⁹ approving Lord Justice Rigby's dissenting judgment in the English Court of Appeal,¹⁵⁰ held that the debenture holders were not liable for payment of the goods. Prior to the winding up order, the receiver was acting as agent of the debtor corporation, pursuant to the contractual provisions contained in the debenture. That agency relationship ceased when the company was wound up, due to the fact that the corporation "was disabled by the winding up order from authorizing the continuance of the business by the receiver."¹⁵¹ Upon the termination of this agency relationship, the receiver did not automatically become the agent of the debenture holders. However, if the debenture holders interfered with the conduct of the receiver following the issuance of the winding up order, the debenture holders could thereby constitute the receiver as their agent. Since there was "no evidence . . . [to suggest] any interference by [the debenture holders] . . . after the date of the winding up order"¹⁵² the court found that the debenture holders did not at any time become the principal of the receiver. Consequently, the debenture holders were held not liable for the receiver's actions. The case hints at the possible personal liability of the receiver for his actions following the winding up of the debtor corporation, without deciding on same.

In reaching this conclusion, Rigby, L.J. provides an excellent summary and analysis of the development of the law relating to the appointment of a receiver. This historical review which is summarized in Chapter I, supra, provides some insight to the question currently under review, namely, whose agent is the privately appointed receiver?

Based upon this historical background, it would appear that it is the mortgagor, or debtor corporation who acts as the principal of the receiver. The relationship between the receiver and his principal, the debtor corporation differs from a standard principal agent relationship, however. In particular, once a receiver has been appointed, the debtor corporation cannot revoke that appointment.¹⁵³

The mortgagor cannot of his own will revoke the appointment of a receiver, or that appointment would be useless. For valuable consideration he [the mortgagor, debtor corporation] has committed the management of his property to an attorney whose appointment he cannot interfere with.

The duties which the receiver must perform and the powers which will be given to the receiver in order to permit him to carry out his duties are all stipulated in the security document agreed to between the mortgagor, debtor corporation, and the mortgagee, debenture holder. According to the decision in Gosling v. Gaskell, the mortgagor is bound by the clauses which bestow those powers and duties. Further, the mortgagor, or debtor corporation, is considered to be the principal of the receiver when the receiver carries out those powers and duties, because the mortgagor has contractually agreed that that will be the case.¹⁵⁴

The receiver's appointment and all directions and powers given and conferred upon him, were supposed to emanate from the mortgagor, and the mortgagee, though he might be the actual appointer, and might have stipulated for all the powers conferred upon the receiver, was in no other position, so far as responsibility was concerned, than if he had been altogether a stranger to the appointment.

Consequently when a deed provides that the receiver shall be appointed by the trustee debenture holders, and that "any person so appointed shall be the agent of the company, who alone shall be liable

for his acts and defaults,"¹⁵⁵ the House of Lords has held that the receiver is the agent of the debtor corporation as is literally stated in the deemed agency clause. The purpose of including a deemed agency clause in a security instrument is to prevent the debenture holders from becoming the principal of the receiver.¹⁵⁶

Due to the existence of a deemed agency clause in the security instrument under consideration in Gosling v. Gaskell the House of Lords held that the debenture holders were not liable to the plaintiffs for goods which had been purchased by the receiver. According to Lord Davey,¹⁵⁷

there can be no doubt that at the date of his appointment the receiver, though nominated by the mortgagees, became, both in fact and in law, the agent of the mortgagor, i.e. of the company. . . .

If he [the receiver] was not the agent of the . . . [mortgagees] originally, did he become so on the winding-up of the company? . . . The receiver . . . continued to exercise the power of management, and to carry on the business in the same manner as he had done before the winding-up. He purported to exercise powers which . . . he no longer possessed. . . . But I am unable to see how, without any act or assent on their part, . . . [the mortgagees] made him the agent, for the purpose of pledging their credit, of persons who had not previously conferred that authority on him and never contemplated or intended doing so, or held themselves out as his principals.

In the first paragraph of the above quotation the House of Lords seem to be taking a literal approach to the interpretation of the deemed agency clause. That is, that the receiver is simply the agent of the debtor corporation. In the second paragraph, however, the court seems to contemplate the possibility of the agency relationship changing following liquidation of the debtor corporation. It seems that

following liquidation, it would be possible for the debenture holders, were they to act or assent in the appropriate manner, to become the receiver's principal.

This case makes no distinction as to the function being performed by the receiver. Note, however, that the receiver here was in fact carrying on the business of the debtor corporation. Pursuant to Peat Marwick Ltd. v. Consumers' Gas Co., when the receiver conducts and manages the debtor's business, he is properly considered to be the agent of the debtor corporation. Thus although Gosling v. Gaskell does not support Consumers' Gas fully, it is consistent with the subsequent Canadian decision.

A receiver's liability to third parties was also in issue in Cully v. Parsons.¹⁵⁸ In this case, while carrying on the debtor's business, the privately appointed receiver incurred a debt to the plaintiff who then sued the debenture holder for repayment of that debt. The court held that the debenture holder was not liable for payment of the debt, based upon the terms of the debenture itself. The debenture specifically incorporated s. 24(2) of the Conveyancing and Law of Property Act, 1881 which provided that:¹⁵⁹

The receiver shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts or defaults unless the mortgage deed provides otherwise.

The debenture further stated that "the holder of this debenture shall not in making or consenting to such appointment incur any liability to the receiver for his remuneration or otherwise."¹⁶⁰ The court held that these words were clearly "intended to exclude any liability of the

debenture holder for acts of the receiver not only to himself but to third parties."¹⁶¹ Having taken this literal approach to the deemed agency clause, the court held that the receiver was not the agent of the debenture holder, and consequently the debenture holder was not liable for payment of this debt to the third party plaintiff.

Central London Electricity Ltd. v. Berners¹⁶² considered the receiver's liability to pay for electricity supplied to the premises owned by the debtor corporation. Following private appointment pursuant to a debenture containing a deemed agency clause, the receiver signed an agreement with the utility company whereby the receiver undertook, as receiver for the debenture holders, to pay all outstanding and future charges arising from the electricity supplied. Subsequently, a winding-up order was made against the debtor corporation. Action was then commenced against both the debenture holders and the receiver manager for payment of all outstanding electricity costs.

The English Court of King's Bench held that the receiver did not undertake personal liability with the agreement which was executed following his appointment; nor had there been any clear representation that the receiver had authority to bind the debenture holder personally. Thus neither the receiver nor the debenture holder were personally liable for the payment of electrical charges in this case.

The court provided the following guidelines for determining the agency status of the privately appointed receiver:¹⁶³

whether a receiver for debenture holders is the agent of the company or is the agent of the debenture holders depends upon the terms of his appointment and more particularly upon the terms of the debenture.

Where, as in this case, there is a deemed agency clause contained in the debenture, the receiver is properly viewed as the agent of the debtor corporation.

When considering these cases which deal with liability to third parties, the English Courts do not consider the receiver to be an agent of the debenture holder. Rather, the courts interpret the deemed agency provisions in a literal fashion and conclude that the receiver is the agent of the debtor corporation. In all of these cases, the debenture holder has been held not liable to third parties for debts incurred by the receiver. Due to legislative amendments contained in s. 37(1) of the Insolvency Act 1986, however, the receiver is now considered to be personally liable for contracts entered into by him while he is performing his functions, unless the contract provides otherwise. This section further states that the receiver is entitled to be indemnified for this liability out of the debtor corporation's assets. Thus, the Insolvency Act, 1986 has effectively altered the common law such that third parties are now entitled to recover from the receiver, personally, and are no longer restricted to a claim against the debtor corporation.

3. Nature of the Receiver's Possession

In the case of Jeffreys v. Dickson¹⁶⁴ Lord Cranworth specifically discussed whose agent is the privately appointed receiver, as follows: "a receiver who has been appointed by a mortgagee under the ordinary power for that purpose, is in possession as agent, not of the mortgagee [debenture holder], but of the mortgagor [debtor corporation]."¹⁶⁵

The court went on to discuss why the receiver should properly be considered to be the agent of the debtor corporation notwithstanding that it is the debenture holder who actually appoints and directs the receiver:¹⁶⁶

Though it is the mortgagee who in fact appoints the receiver, yet in making the appointment the mortgagee acts, and it is the object of the parties, that he should act, as agent for the mortgagor. He, as agent of the mortgagor, appoints a person to receive the rents, with directions to keep down the interest of the mortgage and to account for the surplus to the mortgagor as his principal. These directions are supposed to emanate, not from the mortgagee, but from the mortgagor; and the receiver, therefore, in the relation between himself and the mortgagor, stands in the position of a person appointed by a deed to which the mortgagee was no party.

This approach is consistent with the approach subsequently taken by the House of Lords in Gosling v. Gaskell.¹⁶⁷

4. Employment and Related Issues

Once a receiver has been appointed, who is responsible to maintain safety in the workplace? Where the receiver is appointed pursuant to a security instrument containing a deemed agency clause, arguably, safety could ultimately be the responsibility of the debtor corporation since the debtor is the deemed principal of the privately appointed receiver. Alternatively, safety could be the responsibility of the debenture holder who is effectively the controlling voice behind the receiver; or, the maintenance of safety in the work place could even be the responsibility of the receiver himself, if the receiver is seen to act independently of both the debtor corporation and of the debenture holder. In Meigh v. Wickenden,¹⁶⁸ the receiver, himself, was found to

be responsible for maintaining safety in the work place on the grounds that he was the occupier of the factory in which the offence took place. On appeal, the receiver argued that based on the existence of a deemed agency clause, the debtor corporation was the true occupier of the premises and that the receiver should not be liable as occupier of the premises since he was merely acting as the agent of the debtor corporation. The receiver's appeal was dismissed.

In upholding the receiver's conviction as the occupier of the factory premises, the court discussed the effect of the deemed agency clause which is commonly inserted in debentures. The Court of King's Bench held that a deemed agency clause "has the effect of protecting the debenture holder from liability as mortgagee in possession or as a principal."¹⁶⁹ It also "has the effect of making it clear that the receiver is to be paid by the company and not by the debenture holder."¹⁷⁰

The court goes on to explain that notwithstanding that the debtor corporation is deemed to be the receiver's principal, the debtor corporation is not in fact in control of the receiver. Although the receiver is referred to as the agent of the debtor, the debtor corporation is in fact incapable of exercising any control over its agent, the receiver. According to the decision in Meigh v. Wickenden, the receiver¹⁷¹

was appointed, not to receive directions from the directors, but to give direction . . . [He] took the place of the directors and was responsible in their stead for the management of the affairs and business of the company.

Following these statements, Viscount Caldecook C.J. quotes from various cases¹⁷² which held that a court appointed receiver-manager assumes the conduct and guidance of the corporation from the board of directors of that company.

The judgment concludes by holding that the receiver "was complete master of the affairs of the company. He had absolute and complete power to manage the property of which he took possession."¹⁷³ Consequently the Court held that the receiver was correctly convicted of the infraction under the Factories Act, as being the person who was in possession of the premises in question.

It is possible to criticise the reasoning in Meigh v. Wickenden as being faulty in two respects. Firstly, the court ignores the prior decisions of Jeffreys v. Dickson¹⁷⁴ and Gaskell v. Gosling¹⁷⁵ which take a literal approach to the interpretation of a deemed agency clause and state that pursuant to the terms of the debenture, the company has contracted to give control over certain matters to the receiver as its agent. At the time of the execution of the debenture, the directors of the debtor corporation contractually agreed that in the event of default under the debenture, certain aspects of their control would be transferred to the receiver. Although the company's directors retain extremely limited powers once a receiver is appointed, they are still notionally in control of the debtor corporation.¹⁷⁶

Secondly, the court in Meigh v. Wickenden relied upon many cases which dealt with a court appointed receiver. The principles from these cases were erroneously applied to a privately appointed receiver. There is a fundamental difference between the status of a court appointed

receiver and a privately appointed receiver.¹⁷⁷ A privately appointed receiver acts as an agent whereas a court appointed receiver acts as an officer of the court. A court appointed receiver is given those powers which are granted by the court order appointing him. Once appointed by the court he acts on his own behalf, and not as an agent. A privately appointed receiver on the other hand is given those powers contractually agreed upon between the creditor and the debtor corporation in the debenture agreement, and in carrying out those powers he acts as an agent. Because of the fundamental differences in the status of the privately appointed receiver and the court appointed receiver, those cases which accurately state that a court appointed receiver functions in his own right, should not be applied to a privately appointed receiver.

In support of the decision in Meigh v. Wickenden, one can argue that the court intended to depart from the traditional or conventional approach which had previously been taken by the English Courts when dealing with the status of the privately appointed receiver. There is a recognition in this judgment that the receiver was in fact the person who was in control of the factory premises and that it was the receiver himself who was in charge of the factory on a daily basis and who, therefore, was the only person who was responsible for and capable of making decisions regarding safety in the workplace. In reaching this conclusion, the court has in effect held that notwithstanding that the receiver was privately appointed and theoretically acted as the agent of the debtor, in reality, the receiver acted independently and therefore

was personally liable for breaching standards set for safety in the workplace. Alternatively, this result is consistent with the interpretation of the Canadian employment cases (supra VI. A. 4.) which illustrate how public policy statements contained in statutes dealing with employee rights are applied to receivers. Arguably, the receiver continues to act as the debtor corporation's agent, however, the governing legislation requires that the employer's agent (i.e. the receiver) shall be personally liable to the employees.

It is also possible to argue that Meigh v. Wickenden is an early (1942) English recognition of the third possible "hat" or third position which was enunciated in Canada in 1985 in Roche v. The Battery Ltd.,¹⁷⁸ which held that it is possible for the receiver to wear any one of three hats, namely: that of agent for the debtor corporation; that of agent for the debenture holder; or finally his own hat whereby the receiver is acting in his own right and is responsible for his own actions. If this is a correct analysis, it would appear that a somewhat similar approach was taken by the very recent decision of the English Court of Appeal in Gomba Holdings UK Ltd. v. Minorities Finance Ltd. case which is discussed in depth infra at Chapter VI. B. 9.

Insofar as Meigh v. Wickenden does not take a literal approach to the deemed agency clause, it is consistent with the decision in Peat Marwick Ltd. v. Consumers' Gas Co. Arguably, however, the case goes one step further than Peat Marwick Ltd. v. Consumers' Gas Co. in its recognition of the possibility that in certain situations, the privately appointed receiver does not act as an agent, but rather acts in his own right and therefore is personally responsible for his own actions.

5. The Receiver as an Officer of the Debtor Corporation

As discussed supra,¹⁷⁹ the British Columbia Company Act currently gives the receiver status as a director of the debtor corporation. Similar enabling legislation was not in place in England in the In re B. Johnson & Co. (Builders) Ltd.¹⁸⁰ case, yet the issue of whether or not a receiver acted as an officer or director of the debtor corporation was of critical importance to the outcome of this English case. The facts of In re B. Johnson are straight forward. A receiver was appointed pursuant to debenture security which had been granted by the debtor corporation. Subsequently, an order was made for the compulsory winding-up of the company and a liquidator was appointed for that purpose. The major shareholder in the debtor corporation commenced this action against both the receiver and the liquidator alleging misfeasance in their conduct of the receivership and winding up respectively. Although the trial court ordered an investigation of their conduct, the English Court of Appeal reversed the trial decision and dismissed the summons against both the receiver and the liquidator.

In order for the court to be in a position to review the conduct of the receiver, it was necessary to establish that the receiver fell within the bounds of the following section of the Company Act (1948):¹⁸¹

s. 333(1) If in the course of winding-up a company it appears that any . . . director, manager or liquidator, or any officer of the company has misapplied any property of the company, the court may, on the application of a contributory, examine into such conduct.

Thus, it was necessary for the court to determine whether or not the receiver was a director, manager, liquidator or officer within the meaning of s. 333(1) of the Company Act. If so, the receiver's actions would be open to review before the court. However, if the function of a receiver did not technically fit within the bounds of s. 333(1), his conduct could not be examined by the court. The narrow issue in this case, therefore, was the interpretation of s. 333 of the Company Act (1948) and the determination of whether or not a receiver fell within the parameters of that section.

In the course of interpreting this statutory provision, the English Court of Appeal examined the receiver's status as an agent and considered the purpose of his appointment. The court stated that receivers and managers who are appointed by a mortgagee or debenture holder out of court,¹⁸²

are, by the effect of the statute law, or of the terms of the debenture, or both, treated, while in possession of the company's assets and exercising the various powers conferred upon them as agents of the company in order that they may be able to deal effectively with third parties. But . . . it is quite plain that a person appointed as a receiver and manager is concerned, not for the benefit of the company but for the benefit of the mortgagee bank, to realize the security; that is the whole purpose of his appointment and the powers which are conferred upon him . . . are . . . really ancillary to the main purpose of the appointment, which is the realization by the mortgagee of the security . . . by the sale of assets.

Evershed, M.R. concludes that a receiver manager is not a manager within the meaning of s. 333(1) of the Company Act (1948). He is not a manager, even though he has been appointed to act as a receiver-manager because his powers of management are very limited. "A person appointed as a receiver and manager is not . . . a manager of the company; he

is . . . [merely] receiver and manager of the property of the company."¹⁸³ As the receiver and manager of the property of the debtor corporation, the receiver "is not managing on the company's behalf but is managing in order to facilitate the exercise by him for the mortgagees, of the mortgagees' power to enforce the security."¹⁸⁴

In re B. Johnson may be authority for the proposition that a receiver should properly be considered to be the agent of the creditor, debenture holder, and many subsequent cases have relied upon In re B. Johnson as authority for this very point.¹⁸⁵ It is possible to argue, however, that this interpretation of the decision is too broad. The case involves an interpretation of a very specific section of the Company Act, and it concludes by holding that a receiver is not an officer, director or manager within the meaning of that section. Perhaps the decision should be limited to its facts and not given general applicability in all receivership situations. A subsequent English case, Smiths Ltd. v. Middleton,¹⁸⁶ discussed infra, supports this criticism of the interpretation of In re B. Johnson. Quaere whether In re B. Johnson is actually authority for the general statement that the receiver is the agent of the debenture holder, as so many subsequent authorities seem to believe is the case.

6. Transfer of Title Following Sale of Land

The Alberta case of Alberta Treasury Branches v. Ryan Construction Ltd.¹⁸⁷ discussed supra, considered the receiver's ability to transfer title to land to a subsequent purchaser in a Torrens jurisdiction.

Although England does not have a similar land registration system, the issue of the receiver's ability to transfer title upon sale of land was considered in the case of Sowman v. David Samuel Trust Ltd.¹⁸⁸ This case involved a debtor corporation which held land mortgages as security from a previous transaction. That is, the debtor corporation was the mortgagee with respect to these land mortgages. The debtor corporation subsequently granted debentures to the bank to secure its own indebtedness. These debentures contained the standard clause deeming a receiver to be the agent of the debtor corporation. They further appointed the bank to be attorney for the corporation for the purpose of executing and otherwise perfecting any agreement required or deemed proper for the purpose of the security. The debtor corporation defaulted under the terms of the debentures and a receiver was privately appointed. Following the appointment of the receiver, the debtor corporation was wound up. Notwithstanding the winding up order, the receiver continued to realize upon the company's assets and in so doing he sold a house which was secured by one of the mortgages held by the debtor corporation. For the purpose of completing the transfer, the vendor was stated to be the debtor corporation and the conveyance was executed both by the receiver and by the debenture holder in its capacity as attorney for the debtor corporation. The Land Registrar refused to accept these documents and to register the purchasers as the new owners of the land. The debenture holder and the receiver then commenced action to require the Registrar to accept the transfer of land.

In determining whether or not the receiver held a valid power of sale, the English Chancery Division in Sowman v. David Samuel Trust Ltd. held that based upon the deemed agency provision contained in the debenture, any sale by the receiver was a sale by the debtor corporation, however, "the authority of the receiver and manager of a company to bind the company is terminated by the compulsory winding up of the company."¹⁸⁹ Notwithstanding that the winding up terminated the agency, pursuant to the decision in Gough's Garage Ltd. v. Pugsley,¹⁹⁰ the winding up of the debtor corporation did not have the effect of terminating the power of the receiver.¹⁹¹

Winding up deprives the receiver . . . of power to bind the company personally by acting as its agent. It does not in the least affect his powers to hold and dispose of the company's property comprised in the debenture, including his power to use the company's name for that purpose, for such powers are given by the disposition of the company's property which it made (in equity) by the debenture itself. That disposition is binding on the company and those claiming through it, as well in liquidation as before liquidation.

Having thus found that the receiver was capable of exercising the power of sale following liquidation of the debtor corporation, the court then considered whether or not the debenture holder could effectively transfer the legal estate as attorney for the debtor corporation. It was held that the power of attorney given to the debenture holder in the debenture gave the debenture holder the authority to execute the transfer on behalf of the debtor corporation.¹⁹²

Based on the decision in Sowman v. David Samuel Trust Ltd. one could argue that the English courts are willing to take a literal approach when determining whose agent is the privately appointed

receiver. Where a deemed agency clause is present in the debenture, the court considers the receiver to be the agent of the debtor corporation, and thus the receiver has the power to transfer land as the debtor corporation's agent. Once the corporation is wound up, the receiver's agency status terminates and it becomes necessary to look elsewhere for a party with the capacity to execute the transfer on behalf of the now defunct debtor corporation. In this case, it was the debenture holder who held a valid power of attorney to execute the conveyance in question.

7. Status in a Legal Action

a. Board of Directors of Debtor Corporation

As discussed in Chapter III.E. supra, once a receiver has been appointed, the powers of the debtor corporation's board of directors are curtailed. The English Court of Appeal considered the impact of the private appointment of a receiver on the debtor's board of directors in Newhart Developments Ltd. v. Co-operative Commercial Bank Ltd.,¹⁹³ and concluded that the powers of the board of directors are not totally suspended following the appointment of a receiver. Rather, the directors retain a residual degree of power which can be exercised as they see fit, provided that their actions do not "in any way . . . threaten the interests of the debenture holders."¹⁹⁴

In Newhart Developments Ltd. a receiver was privately appointed pursuant to a debenture containing a deemed agency clause. Following the receiver's appointment, the directors of the debtor corporation

commenced an action against the debenture holder bank with respect to a contract which had been entered into between the debenture holder and debtor corporation prior to the execution of the debenture. The debenture holders sought to have this action set aside on the grounds that the writ was issued without the knowledge and consent of the receiver. The debtor corporation, however, argued that the action was permissible since the contract in issue was a separate agreement which was totally unconnected with the debenture. The English Court of Appeal held that the plaintiff directors were entitled to continue with the action notwithstanding the lack of knowledge and consent on the part of the receiver.

In reaching this conclusion, the court stated that the board of directors could not undertake any action which would interfere with the function of the receiver. This being the case, it was necessary to define more precisely what is the function of the receiver. Accordingly, the English Court of Appeal in Newhart Developments Ltd. defined the receiver's function in the following terms. It:¹⁹⁵

is not, of course, to wind up the company. It is perhaps interesting to note in passing that when a liquidator is appointed, certainly in a winding up by the court, the powers of the directors immediately cease by statutory provision. There is no such provision in relation to the appointment of a receiver, whose duty it is to protect the interests of the . . . debenture holders. . . . Insofar as it may be requisite and necessary for him in the course of his dealing with the assets of the company, bringing them in and realizing them and so on, to bring actions as well, he is empowered to do so by the company. That makes it possible for him to institute such proceedings without exposing himself to the risk of a liability for costs if the proceedings should fail. But the provision in the debenture trust deed giving him that power is an enabling provision which invests him with the capacity to bring an action in the name of the company. It does not divest the directors

of the company of their power as the governing body of the company, of instituting proceedings in a situation where so doing does not in any way impinge prejudicially on the position of the debenture holder by threatening or imperilling the assets which are subject to the charge.

From this it would appear that the receiver's function is to gather in the assets of the debtor corporation and to realize upon those assets. As long as the board of directors does not interfere with that function, the directors can take whatever action they deem fit.

The next question which must be considered is whether or not it is in fact possible for the directors to act in such a way that they would not be interfering with the functions of the receiver. In order to answer this question one must examine whose interests are being protected by both the receiver and the board of directors. Newhart Developments Ltd. provides the following analysis:¹⁹⁶

The receiver is entitled to ignore the claims of anybody outside the debenture holders. Not so the company; not so therefore the directors of the company. If there is an asset which appears to be of value, although the directors can not deal with it, they are under a duty to exploit it so as to bring it to realization which may be fruitful to all concerned.

Thus, so long as the directors' actions do not threaten the interests of the debenture holders, the board of directors can take action to protect the interests of creditors other than the debenture holder.

It is interesting to note that Newhart Developments Ltd. does not directly state whose agent is the privately appointed receiver. In this case, the receiver would, at least superficially, be considered to be the agent of the debtor corporation due to the existence of the deemed agency clause which was present in the debenture. Notice however that the English Court of Appeal identifies that the receiver's primary

obligation is to protect the interests of the debenture holder. Arguably, this implies that the receiver is in essence the agent of the debenture holder. Although not expressly stated in the judgment, the court in Newhart Developments Ltd. has obviously not taken an entirely literal approach to the interpretation of the deemed agency clause.

If the deemed agency clause was interpreted literally, such that the receiver is the agent of the debtor corporation, one would think that both the receiver and the debtor corporation would be obliged to protect the same interests. This is not so, however, according to the quotation supra from Newhart Developments Ltd.¹⁹⁷ The receiver must protect the interests of the debenture holder and may ignore all other claims, whereas the board of directors must protect as much as possible, the claims of all creditors beyond the debenture holder. This points to a possible anomaly in the agency relationship between the receiver and the debtor corporation. If the receiver is the agent of the debtor corporation for all purposes, then receiver should have the same concerns as that of his principal, the debtor corporation; that is, the receiver should be concerned with the interests of all of the creditors and not just with the interests of the debenture holder. It is possible, however, for a receiver to be appointed for a limited purpose with the result that the interests of the receiver as agent would be different from that of his principal. Thus the failure of the court in Newhart Developments Ltd. to identify the interests of the receiver to be exactly the same as the interests of the debtor corporation provides

some additional, although inconclusive, evidence of the link which is being made between the receiver and the debenture holder.

b. Receiver

Although Newhart Developments Ltd. v. Co-operative Commercial Bank Ltd.¹⁹⁸ implies that the receiver may be considered to be the agent of the debenture holder, a subsequent decision by the English Court of Appeal in Cretanor Maritime Company Ltd. v. Irish Marine Management Ltd.¹⁹⁹ clearly states that when a deemed agency clause is present in the debenture, the receiver is the agent of the debtor corporation and he can not at the same time act as the agent of the debenture holder. In Cretanor Maritime Co. Ltd. the debtor corporation executed a debenture which provided that the receiver should be deemed to be the agent of the debtor corporation. Prior to the appointment of the receiver, a Mareva injunction was granted preventing the removal or disposition of the debtor corporation's assets up to a particular value. Once appointed, the receiver applied for an order discharging the injunction. The Court of Appeal held that the receiver did not have standing to apply for the discharge of the injunction since he was acting as the agent of the debtor corporation. The debenture holder did have sufficient standing to apply for such relief, however, and the court ordered that the summons be amended "so as to make the debenture holder an additional applicant"²⁰⁰ in the discharge application.

In reaching this conclusion, the English Court of Appeal stated that a receiver cannot be the agent of both the debtor corporation and of the debenture holder. Pursuant to the deemed agency clause:²⁰¹

the receiver is deemed to be the agent of the . . . [debtor corporation] and the . . . [debtor corporation is] solely responsible for his acts or defaults and for his remuneration. His appointment was, of course, with a view to getting in the . . . [debtor corporation's] assets for the benefit of its creditors and primarily of the debenture holders but with a view to his doing so in the capacity of the . . . [debtor corporation's] agent. . . . [Being the agent of the debtor corporation] is inconsistent with the receiver being at the same time the agent of the debenture holder at any rate in the absence of some special provision to that effect (see Gosling v. Gaskell [1897] A.C. 575). Though appointed by the debenture holder, he is appointed agent of the . . . [debtor corporation] under the power in that behalf conferred upon the debenture holder by the debenture.

According to this decision, the receiver, as the agent of the debtor corporation, is bound by the same liabilities and presumably the same interests as is his principal, the debtor corporation. "The receiver, as the . . . [debtor corporation's] agent is also bound by the injunction. But the debenture holder is not so bound."²⁰² This literal approach to a deemed agency clause seems inconsistent with the court's previous judgment in Newhart Developments Ltd. and it is also contrary to the "two hat" or "double agent" approach which has been adopted by the Canadian Courts.

The literal approach which was taken by the court in Cretanor Maritime Co. Ltd. established a link between the debtor corporation, as principal, and the receiver as agent such that the receiver established his standing in a court action on the basis of the debtor corporation's standing. Thus where the debtor was barred from seeking certain relief, so too was its agent, the receiver.

An attempt by a privately appointed receiver to continue a court action on behalf of the debtor following winding up of the debtor

corporation similarly raises the question of the standing which is held by the receiver in a court action. In addition, this fact situation raises the issue of whether or not the privately appointed receiver's agency status ends and if so upon what conditions and with what consequences.

These issues were discussed by the English Court of Queen's Bench in Bacal Contracting Ltd. v. Modern Engineering (Bristol) Ltd. & Others.²⁰³ In this case, the plaintiff, debtor corporation, was the main contractor for the construction of a warehouse. Work on the building had been subcontracted to the defendant. Following construction the building collapsed. The debtor corporation commenced action against the subcontractor with respect to the collapsed building. Two years after this action was commenced, a receiver and manager was appointed for the debtor corporation and from that point forward the receiver took charge of the plaintiff's construction litigation action. One year after the appointment of the receiver, the plaintiff, debtor corporation, was wound up; notwithstanding the winding up order, however, the receiver continued to pursue this legal action against the subcontractor. The official liquidator of the debtor corporation was not involved and indeed was not even authorized to be involved in the conduct of the lawsuit.

The defendant subcontractor applied for an order that the receiver pay its costs since the date of the liquidation order. In order to determine the outcome of this application the following issue was identified as being before the court: "what is the status of a

debenture holder's receiver who, after a compulsory winding up order, carries on a preexisting action and can he be made subject to an order for costs?"²⁰⁴

The court held that where the debenture contains the standard deemed agency clause, as was the case here, the receiver is to be considered to be the agent of the debtor corporation. This status changes, however, once the corporation is wound up. "It is clear law that on a compulsory winding up the receiver ceases to be the agent for the [debtor] company."²⁰⁵ Although the receiver's status as agent ceases upon winding up, his ability to function does not automatically cease.²⁰⁶

After a compulsory winding up, the receiver may, although he is no longer agent for the company, continue to gather in the assets on behalf of the debenture holders and to take legal proceedings for that purpose [emphasis added].

Thus, the receiver possesses the power to continue the action following the winding up order, but after that point in time, he no longer acts as the agent of the debtor corporation. Based on the decision in Gosling v. Gaskell, the court also ruled that following the winding up order, the receiver did not act as the agent of the debenture holder. Rather, the court found the receiver to be personally liable to pay the defendant subcontractor's costs.

8. Duty of the Receiver to Other Parties

The privately appointed receiver, as agent, is in an anomalous position. He is deemed to be the agent of the debtor corporation and yet he is often appointed by and answerable to the debenture holder.

Based upon English jurisprudence, to whom is the receiver accountable? The case of Smiths Ltd. v. Middleton²⁰⁷ considered the receiver's duty to account to the debtor corporation once management of the business had been returned to the company. Latchford v. Beirne,²⁰⁸ Standard Chartered Bank Ltd. v. Walker²⁰⁹ and American Express International Banking Corp. v. Hurley²¹⁰ examine whether or not the receiver owes a duty of care and accounting to the debtor corporation's guarantors. In discussing the duties owed by the receiver to the debtor corporation and its guarantors, these cases also provide some insight into the issue of whose agent is the privately appointed receiver.

a. Duty to Account to the Debtor Corporation

Smiths Ltd. v. Middleton²¹¹ involved the story of a successful receivership. A receiver was appointed by the debenture holder pursuant to a debenture which contained a deemed agency provision. The receiver managed the debtor corporation's business successfully and profitably, paid off the debtor's indebtedness to the debenture holder and was then discharged. Management of the business was returned to the directors. Following the discharge of the receiver, the debtor corporation successfully applied to the court requesting that the receiver supply a detailed accounting of all payments and receipts arising during the course of the receivership, together with an accounting of the receiver's calculation of his own remuneration.

The court's decision to require the receiver to account to the debtor corporation was based upon the notion that the receiver was the agent of the debtor corporation. The debtor was entitled to a detailed

accounting because the receiver "is the mortgagor's [debtor corporation's] agent; a peculiar sort of agent, of course, but nevertheless an agent and an agent is prima facie an accountable party."²¹² The court further acknowledged that the receiver's agency status was unique. The receiver:²¹³

is to a very large extent running the company on the directors' behalf. I appreciate he is not managing the business strictly for the company but he is the receiver of the property of the company and the practicalities are that he is largely running the company on the directors' behalf.

This literal interpretation of the deemed agency clause illustrates that notwithstanding that the agency relationship which exists between the receiver and the debtor corporation is unusual or unorthodox in some respects, the court was still willing to recognize the existence of an agency relationship and to impose rules of accountability on the receiver with respect to his principal, the debtor corporation.

b. Duty to the Debtor Corporation's Guarantors.

While Smith's Ltd. v. Middleton discussed the duty of the privately appointed receiver to account to his own principal, the debtor corporation, the case of Latchford v. Beirne²¹⁴ goes one step further than Smith's Ltd. v. Middleton to question whether or not a privately appointed receiver owes a duty to any of the persons that have guaranteed the repayment of the debtor corporation's debt obligations. In Latchford v. Beirne, a bank loaned money to the debtor corporation and as security for the repayment of those funds the bank demanded both

a debenture over the assets of the debtor corporation, and a personal guarantee from the director and controlling shareholder of the debtor corporation. A personal guarantee is the contractual promise of the guarantor to pay the debt of the principal debtor should that debtor default under its own debt obligations. "In every case of guarantee there are at least two obligations, a primary and a secondary. The secondary -- the guarantee -- is based upon the primary, and is enforceable only if the primary defaults."²¹⁵ Upon default in repayment of the debenture, in Latchford v. Beirne, a receiver was appointed who sold the debtor corporation's assets in order to satisfy the corporation's indebtedness to the bank. Pursuant to the terms of the personal guarantee, if the value received from the sale of the debtor corporation's assets was insufficient to satisfy all of the monies due and owing under the primary debt to the debenture holder, the debenture holder could then look to the guarantor for payment of the deficiency. Obviously, therefore, it would be in the best interests of the guarantor to have the receiver liquidate the assets of the debtor corporation at the highest possible price. In Latchford v. Beirne, following the receiver's liquidation of the debtor's assets, the guarantor commenced a damage action against the receiver, claiming that the receiver owed the guarantor a duty to take reasonable care to ensure that the corporation's assets "were properly accounted for and that the proper price was obtained for the assets which were sold."²¹⁶ The court held, however, that the receiver did not owe any such duty to the guarantor. The judgment states that a guarantor at best can be "described as 'a contingent creditor' of the mortgagor,"²¹⁷ and that a receiver does not

owe "any duty to the creditors or shareholders of the company giving the debenture, or to a guarantor of a debtor company."²¹⁸

In reaching this conclusion, Mr. Justice Milmo makes some interesting statements which are of some assistance in determining who is the principal of the privately appointed receiver. Milmo, J., acknowledged that when a mortgagee exercises its power of sale, the mortgagee is obligated to use reasonable care to obtain the true value of the property in question.²¹⁹

It is now well settled that a mortgagee exercising his power of sale in the absence of contractual provision to the contrary, owes a duty to the mortgagor to take reasonable care to get the true market value of the security at the moment when he (the mortgagee) chooses to sell.

The court then expanded this duty which exists between the mortgagor and mortgagee, and found that a privately appointed receiver owes a similar duty of care to the mortgagor (debtor corporation).²²⁰

[It] necessarily follows that a receiver appointed by a mortgagee to realize the mortgagee's security, although for certain purposes he is the agent of the mortgagor, has a primary duty to protect the interests of the mortgagee who has appointed him and cannot owe a higher duty to the mortgagor than is owed to the mortgagor by the mortgagee himself.

Implicit in this conclusion, is the identification of a very strong relationship between the receiver and the mortgagee, debenture holder. According to the quote excerpted immediately above, the receiver is appointed by the debenture holder and owes a primary duty to the debenture holder to protect the debenture holder's interests.

The court in Latchford v. Beirne suggests that there is a strong connection between the receiver and the debtor corporation and between

the receiver and the debenture holder. Notwithstanding that the court specifically held that for certain unspecified purposes, the receiver is the agent of the debtor corporation, the court also stated that the primary duty of the receiver is to protect the interests of the debenture holder who appointed him. This identifies the debtor corporation as the receiver's principal and at the same time suggests a very strong connection between the receiver and the debenture holder. If the receiver's primary duty is to protect the debenture holder's interests, surely this implies that the receiver is acting as some sort of representative of the debenture holder. Based upon this analysis, it seems logical to imply that the receiver is acting as the agent of the debenture holder.

Further evidence of the close relationship which exists between the receiver and the debenture holder is enunciated in the concluding paragraph of Mr. Justice Milmo's decision where he states:²²¹

In my judgment, a receiver, exercising a power of sale on behalf of a creditor [debenture holder], cannot be in any weaker position than the creditor would have been in had he chosen to exercise the power himself. [emphasis added]

Latchford v. Beirne does not expressly support the Canadian "two hat" theory which states that depending upon what function is being carried out by the receiver, the receiver is the agent of either the debtor corporation or the debenture holder. The case does state that the receiver is the agent of the debtor corporation for certain unspecified, and presumably limited, purposes. It also implies that there is a very strong relationship, of a representative nature, which exists between the receiver and the debenture holder. Although not

specifically identified as an agency relationship, the description of the connection between the receiver and the debenture holder is consistent with a principal agent relationship. It is possible to argue, therefore, that there may be some limited recognition of the Canadian two-hat theory in this more recent English decision.

The case of Standard Chartered Bank Ltd. v. Walker²²² disagrees with that portion of Latchford v. Beirne²²³ which discusses the receiver's duty towards the debtor corporation's guarantors. This case does not, however, comment upon the obiter statements in Latchford v. Beirne which imply that a relationship exists between the receiver and the debenture holder. Lord Denning, in Standard Chartered Bank Ltd., analyses the relationship which exists between the debtor corporation and the guarantor. He concludes that the guarantor is not simply a creditor of the company; there is a special relationship in existence between the debtor corporation and the guarantor due to the fact that²²⁴

the guarantor's liability is dependent on the company's . . . [and consequently], the receiver owes a duty not only to the company, but to the guarantor, to exercise reasonable care in the disposal of the assets.

In imposing a duty to the guarantor upon the receiver, Lord Denning considers the privately appointed receiver's status as agent.²²⁵

The receiver is the agent of the company, not of the debenture holder, the bank. The debenture holder, the bank, is not responsible for what the receiver does except insofar as it gives him directions or interferes with the conduct of the realization. If it does so, then it too is under a duty to use reasonable care towards the company and the guarantor.

Lord Justice Fox concurs with Lord Denning by stating the following:²²⁶

Apart from intervention in the conduct of the receivership, the bank can rely on the provisions of the debenture making the receiver the agent of the company. But, it is said, if the bank gave directions to the receiver as to the conduct of the sale, the receiver became the agent of the bank; and it is said, in such an event, if the receiver was negligent, the bank was liable.

Thus the English Court of Appeal accepts that where there is a deemed agency provision contained in a debenture, the privately appointed receiver is to be seen as the agent of the debtor corporation. Notwithstanding that the receiver is the agent of the debtor corporation, it is possible, however, for the receiver to become the agent of the debenture holder. This shift will occur if the debenture holder interferes with the actions of the receiver. According to Standard Chartered Bank Ltd. v. Walker the debenture holder may interfere with the receiver by giving directions to the receiver regarding the conduct of the sale of the debtor's assets, or by interfering with the conduct of the said sale.

The court did not decide whether the conduct of the debenture holder in this case amounted to sufficient interference so as to constitute the receiver as its agent. Rather, the court stated that the matter should be sent to trial in order to determine whether or not such interference was present. According to Lord Denning,²²⁷

[t]here is a triable issue whether or not the bank did interfere with the sale in such a way as to take away some of the receiver's discretion, not only by directing him to sell as quickly as possible but also in regard to publicity and so forth.

Thus, although Standard Chartered Bank v. Walker initially takes a literal approach toward the interpretation of the deemed agency clause,

it clearly acknowledges the possibility that a privately appointed receiver can become the agent of the debenture holder.

The agency status of the privately appointed receiver was again considered in American Express International Banking Corp. v. Hurley.²²⁸ In this case, the plaintiff bank advanced funds to the debtor corporation and required as security, a debenture from the debtor corporation and a personal guarantee from Hurley, the director of the debtor corporation. Following this, the business of the debtor failed to prosper with the result that the debenture holder appointed a receiver in October of 1981. In February 1982 the debtor corporation was wound up, but notwithstanding this liquidation, the receiver continued to act. In March 1983 the bank demanded payment from the guarantor and in April 1983 the receiver sold all of the debtor corporation's equipment to a third party for a sum which was insufficient to retire the debtor corporation's primary indebtedness to the bank. The debenture holder then commenced this action against the guarantor for the deficiency.

In defence of the action on the guarantee, the guarantor Hurley alleged that the receiver had been negligent in the manner in which he conducted the sale of the debtor corporation's equipment. He further argued that the receiver was the agent of the bank with the result that the bank should be liable for the receiver's negligence.

In reaching its decision, the court identified two separate time periods and analysed the actions and liabilities of the various parties during these specific time frames. The time periods under consideration were:

1. prior to liquidation of the debtor corporation, and
2. subsequent to the liquidation.

The law relating to the agency status of the privately appointed receiver during these two time periods was summarized by Mr. Justice Mann:²²⁹

A receiver appointed under the common form of charge here employed acts as the agent of the mortgagor. . . . If the mortgagor is put into liquidation then the agency terminates. . . . If the receiver continues to act he does not automatically become the agent of the mortgagee . . . but he may become so if the mortgagee treats him as such.

The agency status of the privately appointed receiver, then, is dependent upon two things, namely whether or not the debtor corporation is still in existence and the manner in which the debenture holder has conducted itself following liquidation of the debtor corporation. Chart II, infra, summarizes the possible agency relationships which may exist both prior to and subsequent to liquidation of the debtor corporation.

The uncertain element in the analysis contained in Chart II relates to the conduct of the debenture holder. That is, what conduct or degree of interference on the part of the debenture holder is sufficient to create an agency relationship between the debenture holder and the receiver? Although the court did not directly identify what conduct or interference on the part of the debenture holder was sufficient to create this new agency relationship, the case does provide some guidance in this regard. In American Express International Banking Corp. v. Hurley, the court held that²³⁰

CHART II.

AGENCY RELATIONSHIPS IN A RECEIVERSHIP SETTING

1. Prior to liquidation of the debtor corporation:
 - a. The receiver is agent of the debtor corporation.
 - b. However, if sufficient interference* by the debenture holder is present, the receiver becomes the agent of the debenture holder (per Standard Chartered Bank v. Walker).
2. Following liquidation of the debtor corporation:
 - a. The agency relationship between the debtor corporation and the receiver terminates.
 - b. There is no automatic agency relationship created between the debenture holder and the receiver, however, if sufficient interference* by the debenture holder is present, the receiver becomes the agent of the debenture holder (per American Express v. Hurley).

*Quaere whether the degree of interference required to constitute the receiver as the agent of the debenture holder prior to liquidation should be the same as or different from the degree of interference required after liquidation. If a different degree of interference should be present, how so, and why?

after the liquidation . . . the bank constituted the receiver its agent. . . . There was constant communication between the bank and the receiver and the latter sought the former's approval to take such actions as he proposed to take.

Based on this decision one can argue that constant communication between the receiver and the debenture holder coupled with approval by the debenture holder of the actions of the receiver will amount to sufficient interference by the debenture holder so as to make the receiver its agent.

Having found that the receiver was the agent of the debtor corporation prior to the debtor's liquidation, and agent of the debenture holder following the debtor's liquidation, the English Court of Queen's Bench in the American Express case then discussed the duties which these parties owe to the guarantor of the debtor corporation's primary debt. In so doing, the court enunciated the following legal principles:²³¹

- (i) The mortgagee when selling mortgaged property is under a duty to a guarantor of the mortgagor's debt to take reasonable care in all the circumstances of the case to obtain the true market value of the property.
- (ii) A receiver is under a like duty.
- (iii) The mortgagee is not responsible for what a receiver does whilst he is the mortgagor's agent unless the mortgagee directs or interferes with the receiver's activities.
- (iv) The mortgagee is responsible for what a receiver does whilst he is the mortgagee's agent and acting as such . . .

[Furthermore] when a receiver is in breach of his duty of care to the guarantor whilst acting as the agent of the mortgagee then, insofar as the mortgagee is liable to the guarantor and in the absence of any express exclusion in the contract of agency, the mortgagee would be entitled to an indemnity from the receiver under an implied term of the agency agreement.

American Express International Banking Corp. v. Hurley clearly states that the receiver may first act as the agent of the debtor corporation and may subsequently act as the agent of the debenture holder. The case does not say whether or not these two agency relationships may co-exist simultaneously; nor does it define precisely what acts on the part of the debenture holder will bring the second agency relationship into existence. Insofar as it recognizes the existence of two agency relationships, that is, one between the debtor corporation and the receiver, and the other between the debenture holder and the receiver, American Express v. Hurley is consistent with Peat Marwick v. Consumers' Gas.²³² A major distinction between these cases, however, is that American Express does not distinguish between the two agency relationships based upon what function is being carried out by the receiver. Rather, American Express looks to the conduct of the debenture holder as the determining factor in the creation of an agency relationship between the debenture holder and the receiver.

9. The Tripartite Relationship Between the Receiver, the Debenture Holder and the Debtor Corporation

Gomba Holdings UK Ltd. v. Minorities Finance Ltd.²³³ is an extremely important decision of the English Court of Appeal which discusses, at length, the agency status of the privately appointed receiver as well as the relationships which exist, simultaneously, between the receiver and the debtor corporation, and between the receiver and the debenture holder. The primary issue under consideration in Gomba Holdings related

to the ownership of documents which were created or received by the receiver during the course of the receivership in question.

In this case, the debenture holder appointed Price Waterhouse to act as the receiver and manager of the debtor corporation. Less than two years after this private appointment of the receiver, the receivership was successfully concluded, and the receiver was discharged. Following this, the debtor corporation applied to the courts for an order requiring the receiver to deliver to the debtor all documents which were received or created during the course of the receivership and which, therefore, the debtor argued, belonged to it. The debtor claimed that it was entitled to possession of these documents by reason of direct ownership thereof based on the deemed agency clause contained in the debenture pursuant to which the receiver was appointed. The court granted the order requested and directed the receiver to turn over all relevant documents to its principal, the debtor corporation.

Pursuant to this order, the receiver delivered a large number of documents to the debtor corporation. The receiver failed to turn over other documents, however, which it claimed were not the property of the debtor corporation. In a subsequent court action, which was dismissed, the debtor corporation asserted its ownership of these withheld documents. The debtor's appeal from this second decision was the subject of the application before the English Court of Appeal.

a. Identification of the Tripartite Relationship

The Court of Appeal held that some of the documents which are created during the course of a receivership are owned by the debtor

corporation; some are owned by the debenture holder; and the balance are owned by the receiver, himself. In order to determine which documents properly fall into each category, the court extensively reviewed and analysed the agency relationships which exist in a receivership situation. The English Court of Appeal, in Gomba Holdings UK Ltd. v. Minorities Finance Ltd. discussed the unique nature of the receiver's status as agent, in the following terms:²³⁴

It is said that, as between principal and agent, all documents concerning the principal's affairs which have been prepared or received by the agent belong to the principal and have to be delivered up on the termination of the agency.

In general terms, that is a correct statement of principle but it cannot be applied mechanically to the somewhat complex position of a receivership. The agency of a receiver is not an ordinary agency. It is primarily a device to protect the mortgagee or debenture holder. Thus, the receiver acts as agent for the mortgagor in that he has power to affect the mortgagor's position by acts which, though done for the benefit of the debenture holder, are treated as if they were the acts of the mortgagor. The relationship set up by the debenture and the appointment of a receiver, however, is not simply between the mortgagor and the receiver. It is tripartite and involves the mortgagor, the receiver, and the debenture holder. The receiver is appointed by the debenture holder, on the happening of specified events, and becomes the mortgagor's agent whether the mortgagor likes it or not. And, as a matter of contract between the mortgagor and the debenture holder, the mortgagor will have to pay the receiver's fees. Further, the mortgagor cannot dismiss the receiver since that power is reserved to the debenture holder as another of the contractual terms of the loan. It is to be noted also, that the mortgagor cannot instruct the receiver how to act in the conduct of the receivership.

All this is far removed from the ordinary principal and agent situation so far as the mortgagor and the receiver are concerned. Whilst the receiver is the agent of the mortgagor he is the appointee of the debenture holder and, in practical terms, has a close association with him. Moreover, he owes fiduciary duties to the debenture holder

who has a right, as against the receiver, to be put in possession of all the information concerning the receivership available to the receiver. . . .

The result is that the receiver, in the course of the receivership, performs duties on behalf of the debenture holder as well as the mortgagor.

This lengthy, but extremely important quotation may be summarized as follows. Pursuant to this recent decision of the Court of Appeal, the English courts have, for the first time, acknowledged the existence of the receiver's dual agency status. According to Lord Justice Fox, the execution of a debenture or other security agreement, by the terms contained or implied therein, creates the basis for a receivership relationship. In the event of default under the terms of the security agreement, the receivership process is set in motion. Furthermore, it is the express and implied terms of this security agreement which create and regulate a unique triangular agency relationship between the following parties:



The agency relationship between the receiver and the debtor corporation is a limited one which involves more restraints on the debtor than permissible activities. A much broader, fiduciary relationship, however, exists between the receiver and the debenture holder.

Where the receiver acts as the agent of the debtor corporation, as the principal, the debtor corporation:

a. Must:

- pay the fees of the receiver; and

b. Cannot:

- dismiss the receiver or
- instruct the receiver as to the conduct of the receivership.

In contrast, when the receiver acts as the agent of the debenture holder, as the principal, the debenture holder:

a. Can:

- dismiss the receiver; and
- give instructions to the receiver; but

b. Need not:

- pay the receiver's fees.

Furthermore, as the agent of the debtor corporation, the receiver can affect his principal's (i.e. the debtor corporation's) position for the benefit of the debenture holder.

From this analysis it seems clear that the agency relationships which exist between the receiver and the debtor corporation, and between the receiver and the debenture holder are virtually mirror images of one another: the debenture holder maintains the control and all of the advantages of the receivership, whereas the debtor corporation lacks control and incurs all of the disadvantages thereof. Receivership and its resulting division of benefits, is primarily designed to protect the debenture holder through an agreement which was contractually consented

to by the debtor corporation and the debenture holder at the time of execution of the security agreement, which of course is long before the receivership wheels are actually set in motion.

The court applied these principles to the facts before it in order to determine under what circumstances the receiver acted as the agent of the debenture holder, and under what circumstances the receiver acted as the agent of the debtor corporation. The key element in this determination related to the purpose which was behind each action conducted by the receiver. Thus in this case, the court examined the capacity in which the receiver acted when each individual document was brought into existence, and in so doing, found that at various times during the receivership process, the receiver occupied the following positions:

- agent of the debtor corporation,
- agent of the debenture holder, and
- principal capable of undertaking independent action on his own behalf.

b. Receiver Acting as Agent of the Debtor Corporation

Where the receiver is entrusted with the duty to manage the affairs of the debtor corporation, all documents which are created in pursuance of this duty, for example, ordinary correspondence generated during the conduct of the debtor corporation's business, belong to the debtor corporation.²³⁵ Generalizing from this statement, one can argue that when the receiver is managing the affairs of the debtor

corporation, he is acting as the agent of the debtor. Interestingly, this corresponds exactly with half of the theory of dual agency which was enunciated by the Ontario Court of Appeal in Peat Marwick Ltd. v. Consumers' Gas Co.²³⁶

c. Receiver Acting as Agent of the Debenture Holder

As stated supra, in a receivership relationship, the receiver is under an obligation to advise and inform the debenture holder of the general conduct of the receivership. In conjunction with this duty, the receiver must inform the debenture holder of the state of the debenture holder's security.²³⁷ Thus, according to the English Court of Appeal in Gomba Holdings UK Ltd. any documents which are received or created by the receiver for the purpose of informing the debenture holder of the conduct of the receivership or of the state of the debenture holder's security are created by the receiver in his capacity as agent of the debenture holder. Thus, these documents belong to the debenture holder.

d. Receiver Acting on His Own Behalf

Although the privately appointed receiver in a receivership setting acts primarily as the agent of either the debtor corporation or the debenture holder, it is possible for the receiver to act independently in certain circumstances. Thus the court held that where the receiver created documents which were strictly for his own use, for example, "notes with an exclusively internal circulation prepared by the receiver [and] . . . relating to the receivership . . . belong to the receiver."²³⁸ Based upon this portion of the judgment, it is possible

to argue that where the receiver acts purely in an administrative capacity for the purpose of conducting or operating the receivership process itself, the privately appointed receiver acts on his own behalf, and in this situation, he is the agent of neither the debenture holder nor the debtor corporation. This conclusion is consistent with the reasoning in Roche v. The Battery Ltd.,²³⁹ a decision of the Newfoundland Supreme Court Trial Division which expanded upon the two-hat theory previously enunciated in Peat Marwick Ltd. v. Consumers' Gas Co., and with the 1942 English Court of King's Bench decision in Meigh v. Wickenden.²⁴⁰

e. Comparison of the Tripartite Relationship and the Dual Agency Theory

It is apparent that the receivership tripartite relationship identified by the English Court of Appeal in Gomba Holdings UK Ltd. v. Minorities Finance Ltd.²⁴¹ closely parallels the dual agency, or "two-hat" theory enunciated by the Ontario Court of Appeal in Peat Marwick Ltd. v. Consumers' Gas Co.²⁴²

These two theories are similar in that they both state that the privately appointed receiver may act as the agent of either the debtor corporation or the security holder. Implicit in this statement is the fact that neither theory adopts a literal approach to the interpretation of a deemed agency clause.

As stated in section a., supra, both the English tripartite theory and the Canadian two hat theory conclude that during the management

phase of a receivership, the receiver acts as the agent of the debtor corporation.

The cases which expound these theories are, however, somewhat different in their treatment of the receiver as the agent of the debenture holder. Pursuant to Peat Marwick v. Consumers' Gas, the receiver is the agent of the debenture holder when the receiver is liquidating the security held by the debenture holder. Gomba Holdings UK Ltd., on the other hand is somewhat less specific in its treatment of the receiver's status as agent of the debenture holder. According to the English case, documents which are created by the receiver for the purpose of advising the debenture holder of the status of its security are owned by the debenture holder. From this, one can extrapolate that when the receiver is advising the debenture holder of the status of its security, the receiver is acting as the agent of the debenture holder.

It is submitted that these two theories can be combined and generalized as follows:

Both Gomba Holdings UK Ltd. and Peat Marwick v. Consumers' Gas agree that when the receiver is specifically dealing with the debenture holder's security, either by way of liquidating the same (as in Peat Marwick) or by advising the debenture holder of the status of its security (as in Gomba Holdings), the receiver acts as the agent of the debenture holder.

Gomba Holdings UK Ltd. goes one step further than Peat Marwick v. Consumers' Gas, however in that it adopts a "third hat" which may be worn by the receiver during the course of the receivership (consistent with Meigh v. Wickenden²⁴³ and Roche v. The Battery Ltd.²⁴⁴). As stated

supra, it is possible for the receiver to act independently of the debtor corporation or the debenture holder in those situations where the receiver is performing strictly administrative tasks which are directed towards the operation of the receivership process.

Although the English Court of Appeal does not specifically rely upon the decision in Peat Marwick Ltd. v. Consumers' Gas Co., based upon the decision in Gomba Holdings UK Ltd. it is apparent that the state of the law dealing with the agency status of the privately appointed receiver is now consistent with Canadian law in this area.

10. Conclusions to be Drawn Based on English Jurisprudence

a. Development of the Law

Based upon the above analysis of English jurisprudence there seems to have been a general development in the law relating to the agency status of the privately appointed receiver. In essence, this development has its roots in Gosling v. Gaskell, an 1897 House of Lords decision which held that a deemed agency clause should be interpreted literally. The House of Lords also alluded to the ability of the receiver to act as the agent of the debenture holder in the event that the debenture holder interfered with the conduct of the receiver. In time there came a recognition of the receiver's obligation to protect the interests of the debenture holder and this recognition has led to the recent enunciation of the tripartite theory regarding the relationships which exist between the receiver, debtor corporation and debenture holder.

Generally, the English courts have taken one of the following four approaches towards answering the question of whose agent is the privately appointed receiver.

i. Literal Approach

Often a literal approach is taken to interpret the debenture pursuant to which the receiver is appointed. Where the debenture contains a clause deeming the receiver to be the agent of the debtor corporation, courts using the literal approach conclude that the receiver is indeed the agent of the debtor corporation, based upon the provisions of the deemed agency clause.

ii. Duty to Protect the Debenture Holder's Interest

Recognition is occasionally given to the possibility that the receiver may act as the agent of the debenture holder. Most often these cases do not find that the receiver is in fact acting as agent for the debenture holder, however, they hold that the receiver's primary obligation or duty is to protect the interests of the debenture holder. This illustrates a strong connection between the receiver and the debenture holder and is suggestive of the existence of an agency relationship between them. (See iv. Tripartite Relationship, infra which takes this duty one step further.)

iii. Interference by the Debenture Holder

An emerging trend in English jurisprudence has been the acceptance

of the debenture holder's ability to constitute the receiver as its agent. Where the debenture holder acts in such a way as to interfere with or direct the actions of the receiver, the receiver will be seen to be the agent of the debenture holder. Interestingly this trend has been based on obiter comments contained in Gosling v. Gaskell,²⁴⁵ an 1897 decision of the House of Lords, which case is also relied upon as authority for many of the decisions which take the literal approach to the interpretation of a deemed agency clause.

iv. Tripartite Relationship

With the recent decision in Gomba Holdings UK Ltd. v. Minorities Finance Ltd., it is submitted that England and Canada have reached similar conclusions with respect to whose agent is the privately appointed receiver. The English Court of Appeal concluded that the privately appointed receiver acts primarily as an agent. The identity of the receiver's principal is determined by examining the function which is being conducted by the receiver rather than by reference to the deemed agency clause contained in the debenture.

Where the receiver is managing the debtor corporation's business, he is acting as the agent of the debtor corporation; where the receiver is fulfilling his duty to the debenture holder and is specifically dealing with the debenture holder's security, (for example, by advising the debenture holder of the status of its security), he is acting as the agent of the debenture holder; and when engaged in purely administrative tasks, the receiver is acting independently.

Chart III provides a useful overview of the four approaches which have been taken by the English courts in determining whose agent is the privately appointed receiver.

CHART III

THE DEVELOPMENT OF THE RECEIVER'S AGENCY STATUS THROUGH ENGLISH JURISPRUDENCE

1. Receiver is agent of debtor corporation based on a literal interpretation of deemed agency clause. Applied in:
 - Cox v. Hickman 1860
 - Gosling v. Gaskell 1897
 - Jeffreys v. Dickson 1866
 - Cully v. Parsons 1923
 - Central London Electricity v. Berners 1945
 - Sowman v. David Samuel Trust 1978
 - Cretanor Maritime v. Irish Marine 1978
 - Smiths v. Middleton 1979

2. Recognition of the receiver's ability to act as agent of the debenture holder; often expressed as the receiver's primary obligation is to protect the debenture holder's interest. See:
 - In re B. Johnson & Co. (Builders) 1955
 - Newhart Developments v. Co-op. Commercial Bank 1978
 - Sowman v. David Samuel Trust 1978 -- perhaps possible after liquidation of debtor corporation
 - Latchford v. Beirne 1981

3. Interference or direction from debenture holder constitutes receiver as the debenture holder's agent. Enunciated in:
 - Gosling v. Gaskell 1897 -- in obiter
 - Bacal Contracting v. Modern Engineering 1980
 - Standard Chartered Bank v. Walker 1982
 - American Express v. Hurley 1985

4. The tripartite relationship between the receiver, the debenture holder and the debtor corporation:
 - defined by: Gomba Holdings UK Ltd. v. Minorities Finance Ltd. 1989
 - suggested in part by: Meigh v. Wickenden 1942

ENDNOTES

CHAPTER VI

1. Alberta Attorney General, Bill 73 Personal Property Security Act, 1985, Commentaries, 4.
2. See supra Ch. III. C.
3. See supra Ch. IV. B. 1.
4. Bennett, Receiverships (1985) 20.
5. In re Vimbos, Ltd., [1900] 1 Ch. 470 at 473 (Ch. D.).
6. Bennett supra n. 4 at 112.
7. Id. at 9.
8. [1896] 1 Q.B. 669 at 692 (Eng. C.A.); Rigby, L.J.'s dissent was subsequently adopted by the House of Lords in Gosling v. Gaskell, [1897] A.C. 575. For a complete discussion of this case, refer to Chapter I supra.
9. Bennett supra n. 4 at 310. Note however that the privately appointed receiver may also be discharged by the court appointment of a receiver. Winding up of the company does not in and of itself terminate the receivership, however it does bring the agency relationship between the receiver and the debtor corporation to an end. See: Sowman v. David Samuel Trust Ltd., [1978] 1 W.L.R. 22 (Eng. Ch.D) and American Express International Banking Corp. v. Hurley, [1985] 3 All E.R. 564 (Q.B.).
10. (1973), 1 O.R. (2d) 281 (Ont. H.C., Stark, J.).
11. (1982), 41 C.B.R. (N.S.) 297 (Alta. Q.B., Egbert, J.).
12. See infra n. 14.
13. Supra n. 10 at 286.
14. Id. at 286, 287.
15. Id. at 282.
16. Supra n. 10 at 283.
17. Id. at 290.

18. (1980), 113 D.L.R. (3d) 754 at 759 (Ont. C.A.), 35 C.B.R. (N.S.) 1, 11 B.L.R. 114. See infra Ch. VI. A. 2., for detailed discussion of this case.
19. Supra n. 11.
20. Supra n. 18.
21. Supra n. 11 at 303.
22. Supra n. 18, confirming for different reasons 97 D.L.R. (3d) 570 at 572.
23. Id. at 97 D.L.R. (3d) 570 at 572.
24. Id.
25. Supra n. 18 at 762.
26. [1982] 5 W.W.R. 509 (Sask. C.A., Brownridge, Hall & Tallis JJ.A.), 17 Sask. R. 415.
27. Id. at W.W.R. 523.
28. (1983), 48 A.R. 108 (Alta. Q.B. Masters Chambers).
29. (1983), 48 C.B.R. (N.S.) 38 (Ont. L.R. Bd.).
30. R.S.O. 1980, c. 228.
31. Supra n. 29 at 53. See Re Price-Waterhouse Ltd., [1979] O.L.R.B. Rep. Jan. 50 which also held that a privately appointed receiver is an agent of the debtor, and not a successor employer.
32. Id. at 55.
33. Id.
34. Id.
35. Id. at 56.
36. RASL Ventures Ltd. (1987), 17 C.L.R.B.R. (N.S.) 1 at 20 (B.C.L.R.B.). Also see Reid v. Explosives Co. (1987), 19 Q.B.D. 264 (Eng. C.A.).
37. United Food & Commercial Workers International Union v. National Bank, supra n. 29.
38. McKeough v. H.B. Nickerson & Sons Ltd. (1985), 71 N.S.R. (2d.) 134 at 147 (N.S.S.C. T.D.).

39. (1980), 34 C.B.R. (N.S.) 97 (Fed. C.A.); application for reconsideration of the court's disposition of costs dismissed at [1980] C.T.C. 406 (Fed. C.A.).
40. (1980), 34 C.B.R. (N.S.) 97 at 113.
41. Id. at 108.
42. Note that In re B. Johnson & Co. (Builders) Ltd. will be critically analysed in Section B, Analysis of English Jurisprudence, infra.
43. Supra n. 40 at 109.
44. (1985), 56 C.B.R. (N.S.) 242 (Nfld. S.C.T.D., Goodridge, J.) For a further discussion of this case, see infra at n. 239 and following.
45. Id. at 244.
46. Id. at 245.
47. Id. at 248.
48. Supra n. 18.
49. Supra n. 44 at 249.
50. Id.
51. Id.
52. Id. at 250.
53. Bennett supra n. 4 at 147.
54. (1980), 35 C.B.R. (N.S.) 134 (Ont. S.C., Eberle, J.).
55. Id. at 137.
56. [1955] Ch. 634, [1955] 2 All E.R. 755; see supra n. 42.
57. Supra n. 54 at 140.
58. Id. Note that Diegel & Feich Inc. v. Donia Consulting Corp. supra n. 54 was relied upon by the Ont. C.A. when reaching its decision that the receiver wears "two hats" in the case of Peat Marwick Ltd. v. Consumers' Gas Co., supra n. 18.

59. See for example Land Titles Act, R.S.A. 1980 C.L-5, s. 68(1). Note that there are certain situations where land can be transferred by a party who is not the registered owner, such as by holders of a power of attorney, executors, trustees in bankruptcy and sheriffs.
60. See supra Ch. III. E. which discusses the suspension of the powers of the company's board of directors upon the appointment of a receiver.
61. The English Chancery Division decision in Sowman v. David Samuel Trust Ltd., [1978] 1 W.L.R. 22, discussed infra considers a similar conveyancing problem.
62. [1983] 3 W.W.R. 137 (Alta. Q.B., Hope, J.); (1982), 10 A.R. 412 (Alta. Q.B. Chambers, Funduk, M.).
63. (1983), 43 A.R. 100 (Alta. Q.B., Veit, J.).
64. (1983), 49 C.B.R. (N.S.) 74 (Alta. Q.B., Foisy, J.).
65. (1983), 29 R.P.R. 9 (Sask. Q.B., Gerein, J.).
66. Supra n. 62 at 138.
67. (1982), 40 A.R. 412 at 422.
68. Note that this approach does not follow the approach taken by the Ontario Supreme Court in Diegel & Feick Inc. v. Donia Consulting Corp. supra n. 54 which held that since the receiver is the agent of the creditor security holder, it has the power to pass title which is free and clear of all subsequent encumbrances.
69. Supra n. 62 at 139, 140. See also: Toronto Dominion Bank v. Agriborealis Ltd. (1988), 68 C.B.R. (N.S.) 313 at 319. (N.W.T. S.C.): "There is nothing before me to suggest that subsequent encumbrancers will be adversely affected by the sale agreement between the bank and the city."
70. Although it is correct that the subsequent encumbrancers would maintain their claim against the debtor corporation, it must be noted that once "stripped off the title" they would lose their priority positions and become mere unsecured creditors of the debtor corporation.
71. Pursuant to the Land Titles Act, R.S.A. 1980, c. L-5, s. 180(1).
72. Supra n. 63.
73. Id. at 105.

74. Similar to the conclusion reached by Master Funduk in Alberta Treasury Branches et al. v. Ryan Construction Ltd., supra n. 62.
75. Supra n. 64.
76. Re First Canadian Land Corporation, (Receiver of) (1988), 60 Alta. L.R. (2d) 251 at 252 (Alta. Q.B., Marshall, J.).
77. Id.
78. Supra n. 62.
79. Supra n. 64.
80. Supra n. 76 at 252.
81. Supra n. 63.
82. Supra n. 76 at 253.
83. R.S.A. 1980, c. L-5, s. 54(1) & 115 (1).
84. Supra n. 76 at 253.
85. Id.
86. Id.
87. Id. at 254.
88. Id. Also see First Investors Corporation Ltd. v. Regional Investments Ltd., [1985] 2 A.U.D. 869 at 874 (Alta. C.A.). The court did not "have any authority to approve what was, after all, a private sale. It is no part of the court's function to approve the actions of a private receiver".
89. Supra n. 65.
90. Business Corporations Act, R.S.S. 1978, c. B-10, s. 91.
91. Supra n. 54.
92. Supra n. 63.
93. Supra n. 62.
94. Supra n. 18.
95. (1983), 48 A.R. 108 (Alta. Q.B., Funduk, M.).
96. Id. at 111.

97. See supra, Ch VI. A.3.
98. Supra n. 3 at 296. Note, however, that Bennett is somewhat ambiguous as to whether these distribution rules apply to both court appointed and privately appointed receivers, or if they apply only to those receivers who are appointed by the court.
99. Id.
100. See supra section VI. A. 2.
101. For a more complete discussion of the English position, see section VI. B. 2. infra.
102. S.A. 1988, c. P-4.05, to come into force on Oct. 1, 1990.
103. Id.
104. Id. at s. 20.
105. (1985), 17 D.L.R. (4th) 236 (Ont. C.A.).
106. (1986), 6 P.P.S.A.C. 71 (Sask. Q.B.); (1987), 42 D.L.R. (4th) 636 (Sask. C.A.).
107. Supra n. 18.
108. Supra n. 105 at 247. "The mere decision to realize falls short of realizing on the security."
109. Supra n. 106.
110. Id. Sask. Q.B. at 75.
111. Id.
112. See supra Ch VI. A.2.
113. Supra n. 17 D.L.R. (3d) at 762.
114. Supra n. 106.
115. Id. C.A. at 647.
116. Company Act, R.S.B.C. 1979, c. 59.
117. Id. s. 142.
118. (1984), 57 B.C.L.R. 360 (B.C.S.C.).

119. (1984), 53 C.B.R. (N.S.) 103 (B.C.S.C., McKenzie, J.).
120. Supra n. 118, at 362.
121. At common law, in the absence of a deemed agency clause, the receiver is considered to be the agent of the debenture holder. See: In re Vimbos, Ltd., [1900] 1 Ch. 470 at 473 (Ch. D.).
122. Provided that the receiver disclosed that he was acting as receiver on behalf of the debtor corporation at the time the sale was made, he cannot be held personally liable on that contract, pursuant to s. 114 of the Company Act, R.S.B.C. 1979, c. 59.
123. Supra n. 118.
124. Supra n. 119.
125. Supra n. 116, s. 112.
126. R.S.B.C. (1980), c. 10, s. 19(1) [am 1983, c. 16, s. 12].
127. Supra n. 119 at 113.
128. British Columbia, Bill - 28 - 1989.
129. Id. at s. 149.
130. Draft Personal Property Security Act Commentary, Province of British Columbia Ministry of Finance and Corporate Relations, released in 1988, p. 80.
131. Supra n. 18.
132. Supra n. 10.
133. Supra n. 11.
134. Supra n. 26.
135. Supra n. 29.
136. Supra n. 39.
137. Supra n. 44.
138. Supra n. 54.
139. Supra n. 62, 63, and 64 respectively.
140. Supra n. 95.

141. Supra n. 105.
142. Supra n. 106.
143. Supra n. 18.
144. Id.
145. Supra n. 4 at 112.
146. (1860), 8 H.L.C. 267, 11 E.R. 431 (H.L.).
147. 11 E.R. 431 at 447.
148. [1897] A.C. 575 (H.L.); [1896] 1 Q.B. 669 (Eng. C.A.) sub nom.
Gaskell v. Gosling.
149. Id.
150. Gaskell v. Gosling, [1896] 1 Q.B. 669 (Eng. C.A.).
151. Id. at 695.
152. Id. at 669.
153. Id. at 692.
154. Id. at 693.
155. Id. at 696.
156. Id. The deemed agency clause is "decisive of the question whether by the appointment, the trustee became principals of the reciever. They are inserted for the very purpose of preventing such a result."
157. Supra n. 148. at 595, 596.
158. [1923] 2 Ch. 512 (Ch. D.).
159. Id. at 516.
160. Id. at 518.
161. Id.
162. [1945] All E.R. 160 (Eng. K.B.).
163. Id. at 164.
164. (1866), 1 L.R. Ch. App. 183.

- 165. Id. at 190.
- 166. Id.
- 167. Supra n. 148 and following.
- 168. [1942] 2 K.B. 160 (Eng. K.B.).
- 169. Id. at 165.
- 170. Id. at 166.
- 171. Id.
- 172. For example see: Parsons v. Sovereign Bank of Canada, [1913] A.C. 160; Moss Steamship Co. v. Whinney, [1912] A.C. 254.
- 173. Supra n. 168 at 168.
- 174. Supra n. 164.
- 175. Supra n. 148.
- 176. See supra, Ch. III. E.
- 177. See supra Ch. IV. A.1 and IV. B.1 which discuss the distinctions between a privately appointed and a court appointed receiver.
- 178. Supra n. 47.
- 179. See supra Ch. VI. A.9.
- 180. [1955] 1 Ch. 634 (Eng. C.A.).
- 181. Id. at 634.
- 182. Supra n. 180 at 644, 645.
- 183. Id. at 646.
- 184. Id.
- 185. For example, see Diegel & Feick Inc. v. Donia Consulting Corp. supra n. 54, Ostrander v. Niagara Helicopters Ltd. supra n. 10, and R. v. Coopers & Lybrand supra n. 39.

186. [1979] 3 All E.R. 842 (Eng. Ch. D.), which states at p. 846 that In re B. Johnson "was a case concerned with the question of whether a receiver and manager was an officer of the company for the purpose of misfeasance proceedings under s. 333 of the 1948 Act and was not directly in point."
187. Supra n. 62. As stated at p. 421: "without legislation the "conveyencing problem" described . . . in Sowman . . . proves an insurmountable barrier in a jurisdiction which has a Torrens land registry system."
188. [1978] 1 W.L.R. 22 (Eng. Ch.D.).
189. Id. at 27.
190. [1930] 1 K.B. 615.
191. Supra n. 188 at 30.
192. This finding was based both on the common law rule that an authority coupled with an interest is irrevocable and on s. 4 of the Powers of Attorney Act (1971).
193. [1978] 2 All E.R. 896 (Eng. C.A.).
194. Id. at 901.
195. Id. at 900.
196. Id.
197. Supra n. 184.
198. Id.
199. [1978] 1 W.L.R. 966 (Eng. C.A.).
200. Id. at 978.
201. Id. at 975.
202. Id.
203. [1980] 2 All E.R. 655 (Eng. Q.B.).
204. Id. at 658.
205. Id.
206. Id. at 659.

- 207. Supra n. 186.
- 208. [1981] 3 All E.R. 705 (Eng. Q.B.).
- 209. [1982] 3 All E.R. 938 (Eng. C.A.).
- 210. [1985] 3 All E.R. 564 (Eng. Q.B.).
- 211. Supra n. 186.
- 212. Id. at 846.
- 213. Id. at 847.
- 214. Supra n. 208.
- 215. Bank of Nova Scotia v. Ham, [1986] 5 W.W.R. 249 at 252 (Sask. C.A.). Also see Seattle First Holding Co. Inc. v. Western Crane Services Ltd. (1987), 56 Alta. L.R. (2d) 39 at 43 (Alta. Q.B.).
- 216. Supra n. 208 at 706.
- 217. Id.
- 218. Id. at 709.
- 219. Id. at 708.
- 220. Id.
- 221. Id. at 710.
- 222. Supra n. 209.
- 223. Supra n. 208.
- 224. Supra n. 209 at 943. Also see Gregory Mitchell, "A Receiver's Duty of Care" (1982), 132 N.L.J. 1137 wherein he argues that a receiver may owe a duty of care to the creditors of the debtor corporation.
- 225. Standard Chartered Bank Ltd. v. Walker, id. at 942. Lord Denning relies upon the law as stated in Gosling v. Gaskell discussed at length supra n. 148 and following.
- 226. Id. at 944, 945.
- 227. Id. at 942.
- 228. Supra n. 210.

- 229. Id. at 568.
- 230. Id.
- 231. Id. at 571.
- 232. Supra n. 18.
- 233. [1989] 1 All E.R. 261 (Eng. C.A.). Note, at 266, leave to appeal to the House of Lords was refused.
- 234. Id. at 263.
- 235. Id.
- 236. Supra n. 18.
- 237. Supra n. 233 at 264.
- 238. Id. at 265.
- 239. Supra n. 44.
- 240. Supra n. 168.
- 241. Supra n. 225.
- 242. Supra n. 17.
- 243. Supra n. 168.
- 244. Supra n. 44.
- 245. Supra n. 18.

VII. CONCLUSION

This thesis has been directed towards an analysis of whose agent is the privately appointed receiver. The answer to this question is of great significance due to the frequent practice of appointing receivers privately. Where the debenture is silent regarding the agency status of the privately appointed receiver, he acts as the agent of the security holder. The receiver's status is much more controversial, however, when the debenture, pursuant to which he is appointed, contains a deemed agency clause which purports to deem the receiver to be the agent of the debtor corporation.

In the typical deemed agency situation, the identity of the principal of the privately appointed receiver is dependent upon what function the receiver happens to be carrying out. The dominant theory which is accepted and applied by the Canadian courts is that where the receiver acts in a managerial capacity, he is acting as the agent of the debtor corporation; where the receiver deals with the debenture holder's security by liquidating same, however, he is acting as the agent of the debenture holder, notwithstanding the existence of the deemed agency clause. Similarly, the dominant theory enunciated in English jurisprudence is that when the receiver is managing the affairs of the debtor corporation, he is acting as the agent of the debtor; when the receiver is dealing with the debenture holder's security, such as by advising the debenture holder of the status of its security, he is acting as the agent of the debenture holder. There is also a recognition in both Canada and England of the privately appointed

receiver's ability, in certain situations, to act independently with the result that he is the agent of neither the debtor corporation nor the security holder.

The law in England and in Canada relating to the agency status of the privately appointed receiver has developed independently. Neither jurisdiction currently takes a literal approach to the interpretation of a deemed agency provision. The movement from a strictly literal approach to the recognition of the possible dual and independent status of the receiver has been a relatively recent development in both jurisdictions and it is submitted that neither jurisdiction has yet completely defined all of the parameters of the theory, nor resolved all of the problems and inconsistencies which currently exist in this area of the law. In particular, there appears to be some potential doubt and inconsistency present in the treatment of employment law matters, transfer of title to land in a Torrens jurisdiction, and liability to third parties.

In employment matters, there is a tendency to hold the receiver to be liable in his own right, with the result that the receiver, himself, has incurred personal liability for such matters as safety in the workplace, payment of union dues, failure to make deductions for income tax purposes and wrongful dismissal. There are two possible explanations for such findings. It may simply be a recognition that the receiver is in fact in control of the daily operation of the debtor's business and of the liquidation thereof, with the result that there is a reluctance by the courts to acknowledge the existence of a possible

agency relationship, especially where doing so would be disadvantageous to the employee.

The majority of employment issues arise during the period of time when the receiver is managing the debtor corporation's business. Applying the commonly accepted two-hat theory, the receiver would then be seen to be acting as the agent of the debtor corporation. One would assume that in most receiverships, the probability of an employee successfully recovering damages of any nature from the debtor corporation is slight. If the sympathy of the courts rests with the individual employee who has had the misfortune of working for a financially troubled company which is now in receivership, the court may prefer to resolve the matter in a way which is favorable to the employee. By not giving effect to a deemed agency clause, and by finding that the receiver is personally liable in employment matters, the courts can accomplish this desire.

Alternatively, it is possible to argue that the finding of personal liability on the part of the receiver is consistent with the third branch of the theory which has now been enunciated both in Canada (Roche v. The Battery Ltd.) and in England (Gomba Holdings UK Ltd. v. Minorities Finance Ltd.). This line of cases indicate that where the receiver acts in a purely administrative capacity, such as by preparing notes, relating to the receivership, which are for his own use, and by hiring employees to assist him in carrying out his managerial obligations, the receiver is acting in his own right, and is not acting as the agent of either the debtor corporation or the debenture holder. Unfortunately, these cases do not provide any further guidelines to

assist one in determining what acts are purely administrative in nature, and it is difficult to know where to draw the line to separate those actions which are administrative, from those actions which are managerial in nature. Obviously, this line is important to draw since in the former case the receiver is personally liable for his actions, whereas the latter case, the debtor corporation is liable as the receiver's principal. To support a finding of personal liability in employment matters, it would be necessary to establish that the receiver was acting in an administrative capacity when he hired and dealt with the employees in question. Presumably, this would be a question of fact, to be answered by examining the particular circumstances of each employment relationship, and where the facts support a finding that the employees are assisting the receiver with his managerial obligations, the receiver should be held personally liable for his actions.

Another area which is inconsistent with the dominant theory concerns the receiver's ability to transfer title to land. The dominant theory accepts that the receiver acts as the agent of the debenture holder when liquidating the property of the debtor corporation. Legislation in jurisdictions with a Torrens system of land registration prohibits the registration of a transfer of land unless the transfer document is executed by the registered owner of the land or its agent. Thus, in these jurisdictions, a finding that the receiver is the agent of the debenture holder effectively prohibits him from transferring title to the debtor's land. In order to facilitate registration of the transfer of title, cases which discuss this issue have consistently

found that the receiver is acting as the agent of the debtor corporation. Such a finding is, of course, inconsistent with the commonly accepted status which is attributed to the privately appointed receiver. This inconsistency appears to be present for the sole purpose of complying with the technical requirements of land registration. It is submitted that the inconsistency could be corrected by amending the governing legislation in such a way as to specifically grant to a privately appointed receiver the power to execute a valid transfer of land. In order to protect the interests of the debtor corporation land owner, the legislation could incorporate a requirement for a statutory declaration similar in nature to the one outlined in Re First Canadian Land Corporation. This exception to the general rule which requires the owner or its agent to execute the transfer would have the following results:

1. The receiver would have the ability to execute a valid transfer of the debtor's land without the need to establish that he was acting as the agent of the debtor corporation.
2. In liquidating the debtor corporation's assets, the receiver would be acting as the agent of the debenture holder and would therefore be in a position to pass title, which is free of subsequent encumbrances, to a third party purchaser.

These results are consistent with the dominant theory and would establish not only the receiver's ability to transfer title to land, but also the quality of title which is passed by the receiver.

Lastly, the Canadian practice of paying trade debts in priority to the secured party is potentially inconsistent with the dominant theory

expressed herein. If, by paying debts which are incurred during the course of managing the debtor's business, the receiver establishes that he is the agent of the security holder, this practice is contrary to the two-hat theory postulated by Peat Marwick Ltd. v. Consumers' Gas. Co. It is possible to argue, however, that during the management phase the receiver continues to act as the agent of the debtor corporation notwithstanding that payment of trade debts takes priority over payment to the security holder. It may well be that the security holder is implicitly acknowledging that in order for the receivership process to operate smoothly, certain goods and services must be supplied by various trade creditors. If these creditors suspected that their accounts would continue to go unpaid, they would soon refuse to deal with a privately appointed receiver. This would have a disastrous effect upon the continued operation of the receivership. Thus, arguably, the security holder is not acting as the principal of the receiver during this management phase, but has simply voluntarily subrogated its ultimate claim for payment to the claims of the trade creditors. Seen in this light, the secured party's desire to ensure the continued operation of the receivership by giving priority to the payment of trade debts, does not alter the receiver's status as agent of the debtor corporation, and is not contrary to the dominant theory.

The law relating to the agency status of the privately appointed receiver is very dynamic in nature. The concern over the receiver's agency status is comparatively recent, with the majority of Canadian decisions which discuss the issue having been decided within the past

ten years, and those in England within the past fifty years. When one considers the expanse of time which is covered by the development of the common law, this is very recent, indeed. As previously stated, the law in Canada and England has developed along different lines, with the move away from a literal interpretation of the deemed agency clause in England being much more gradual than that which has occurred in Canada. One developmental step which has been discussed by many English cases but which has not been considered by the Canadian courts involves the degree of control which the debenture holder exercises over the receiver. It is fairly well recognized in England that notwithstanding that the receiver is acting as the agent of the debtor corporation, if the debenture holder exercises sufficient control over the actions of the receiver, it is possible for the debenture holder to become the de facto principal of the receiver. Although this aspect of the law has not yet been introduced into Canadian jurisprudence, there is nothing in the two-hat theory which would preclude the application of this argument in Canada. The question which remains unanswered at this time involves what degree of control by the debenture holder would be required to upset the normal finding that when exercising his managerial functions, the receiver is acting as the agent of the debtor corporation. Presumably, for this to occur, there would have to be some form of active interference on the part of the debenture holder; the receiver merely reporting his progress to the security holder should be insufficient to constitute the receiver as the agent of the debenture holder.

Based upon the preceding analysis and conclusions drawn above, it seems that there is a relatively consistent treatment of the status of the privately appointed receiver. Pursuant to the principles of receivership law, the receiver's status is not determined strictly with reference to a literal interpretation of the deemed agency clause. Rather, it is now commonly accepted that the receiver's status is determined by an examination of the function which he happens to be performing. It is possible for the receiver to act in one of the following capacities:

1. as agent of the debtor corporation where he is managing the business affairs of the debtor;
2. as agent of the secured party where he is liquidating the assets of the debtor corporation; or
3. independently where he is directed towards administering the receivership process itself.

The status of the privately appointed receiver can change from one point in time to the next, such that the receiver can at one time be acting as the agent of the debtor corporation and can at a later time in the same receivership be acting for the debenture holder. Thus it is possible according to the principles of receivership law for the receiver to have two separate principals. Can this situation be reconciled with principles of agency law? In an agency situation it is rare to have one agent who acts for different principals in the same transactions. At present, a privately appointed receiver is not expressly recognized as one of the exceptions to the general rule that an agent normally acts for only one principal in any given transaction.

In attempting to reconcile the treatment of the receiver by these two divergent branches of the law, it is helpful to examine first, the basis upon which each agency relationship arises. The agency relationship between the receiver and the debtor corporation seems quite clearly to be based upon the express deemed agency clause which is contained in the debenture, and upon the express terms of the document which is employed to appoint the receiver, and thus arises from an express contract which is evidenced in writing. The agency relationship between the receiver and the security holder, on the other hand, most logically is based upon a contract which is implied by the conduct of the parties.

It is possible to argue that because these two agency relationships arise independently, they do not overlap or exist at the same time and that they therefore do not conflict with the one principal per transaction rule. Arguably, the two phases of the receivership process are separate and distinct transactions such that one agency relationship arises during the managerial phase, and a second agency relationship arises during the liquidation phases; the fact that the same parties play different roles in each transactions then is a matter of mere coincidence.

The problem with this argument is that it is often difficult to determine at which point the managerial phase of the receivership ends and the liquidation phase begins. In fact, there may not be a sharp line which separates these two phases. There is more likely to be a hazy area where the receiver begins the liquidation process while at the

same time completing some of his managerial functions. In this situation, the receiver would simultaneously be acting for two principals who are contrary in interest, and because a conflict of interest would therefore be created, this would most certainly be unacceptable from an agency law point of view.

It is submitted that a better resolution to this problem would be merely to recognize the privately appointed receiver as one of the exceptions to the normal rule of agency law which provides that an agent can act for only one principal in any given transaction. The dominant theory of receivership law which acknowledges that during the course of the receivership, the receiver may act as the agent of both the debtor corporation and the security holder, is now widely accepted and followed. It would appear that the time is ripe, therefore, for the courts to recognize that certain principles of agency law must evolve in order to remain in harmony with the current rapid development of the principles of receivership law. In particular, the privately appointed receiver should expressly be added to the limited group of agents who are capable of acting for two principals in the same transaction.

Before ending this discussion of whose agent is the privately appointed receiver, it is important to look to the future and to identify those issues which still require further clarification and definition. The receiver's agency status will not be completely settled until it is possible to distinguish more precisely when the managerial phase of the receivership ends and the liquidation phase begins. Another area which has not been resolved to date relates to the possibility of rebutting the prima facie case that the receiver acts as

the agent of the debtor corporation during the management phase of the receivership. Arguably, where the secured party exerts sufficient control over the receiver, the receiver should become the agent of the secured party, notwithstanding the existence of a deemed agency clause and the application of the dominant theory relating to the receiver's status as agent. The precise degree of control which is required in order to create such a reversal remains to be defined by the courts in both Canada and England.

A final, but extremely important aspect of the central issue which is yet to be resolved involves a better understanding of the receiver's ability to act on his own behalf rather than as the agent of either the debenture holder or the debtor corporation. In particular, the courts in the future will have to determine exactly what acts should be considered to be purely administrative in nature with the result that the receiver should properly be held personally liable for those actions.

In summary, the dominant theory regarding whose agent is the privately appointed receiver is that his status is dependent upon what particular function the receiver happens to be fulfilling. Although there are a few inconsistencies in the application of the theory, it is submitted that these do not present insurmountable problems. When applying this theory, conflict arises between the treatment of the receiver as seen from a receivership law point of view as opposed to an agency law point of view. This conflict can be overcome by the creation

of a new exception to the agency law rule which limits the agent's ability to act for more than one principal.

The most important matter which remains outstanding is that guidelines must be established to distinguish between the various roles which the privately appointed receiver may fulfill. These include the managerial, liquidation and administrative tasks which the receiver may be called upon to perform. Once these ambiguities have been clarified, the law relevant to the agency status of the privately appointed receiver will attain the certainty which is presently sought by both the legal and business communities.

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APPENDIX I

Business Corporations Act, S.A. 1981 c. B-15.

Part 8

Receivers and Receiver-Managers

Functions of receiver	89 A receiver of any property of a corporation may, subject to the rights of secured creditors, receive the income from the property, pay the liabilities connected with the property and realize the security interest of those on behalf of whom he is appointed, but, except to the extent permitted by the Court, he may not carry on the business of the corporation.
Functions of receiver-manager	90 A receiver of a corporation may, if he is also appointed receiver-manager of the corporation, carry on any business of the corporation to protect the security interest of those on behalf of whom he is appointed.
Directors' powers during receivership	91 If a receiver-manager is appointed by the Court or under an instrument, the powers of the directors of the corporation that the receiver-manager is authorized to exercise may not be exercised by the directors until the receiver-manager is discharged.
Court-appointed receiver or receiver-manager	92 A receiver or receiver-manager appointed by the Court shall act in accordance with the directions of the Court.
Duty under debt obligation	93 A receiver or receiver-manager appointed under an instrument shall act in accordance with that instrument and any direction of the Court made under section 95.
Duty of care	94 A receiver or receiver-manager of a corporation appointed under an instrument shall (a) act honestly and in good faith, and (b) deal with any property of the corporation in his possession or control in a commercially reasonable manner.
Powers of the Court	95 On an application by a receiver or receiver-manager, whether appointed by the Court or under an instrument, or on an application by any interested person, the Court may make any order it thinks fit including, without limiting the generality of the foregoing, any or all of the following: (a) an order appointing, replacing or discharging a receiver or receiver-manager and approving his accounts; (b) an order determining the notice to be given to any person or dispensing with notice to any person; (c) an order fixing the remuneration of the receiver or receiver-manager; (d) an order (i) requiring the receiver or receiver-manager, or a person by or on behalf of whom he is appointed, to make good any default in connection with the receiver's or receiver-manager's custody or management of the property and business of the corporation;

- (ii) relieving any of those persons from any default on any terms the Court thinks fit;
- (iii) confirming any act of the receiver or receiver-manager;
- (d.1) an order that the receiver or receiver-manager make available to the applicant any information from the accounts of his administration that the Court specifies;
- (e) an order giving directions on any matter relating to the duties of the receiver or receiver-manager.

1981 cB-15 s95; 1987 c15 s9

Duties of
receiver and
receiver-manager**96 A receiver or receiver-manager shall**

- (a) immediately notify the Registrar of his appointment or discharge;
- (b) take into his custody and control the property of the corporation in accordance with the Court order or instrument under which he is appointed;
- (c) open and maintain a bank account in his name as receiver or receiver-manager of the corporation for the money of the corporation coming under his control;
- (d) keep detailed accounts of all transactions carried out by him as receiver or receiver-manager;
- (e) keep accounts of his administration that shall be available during usual business hours for inspection by the directors of the corporation;
- (f) prepare at least once in every 6-month period after the date of his appointment financial statements of his administration as far as is practicable in the form required by section 149, and, subject to any order of the Court, file a copy of them with the Registrar within 60 days after the end of each 6-month period, and
- (g) on completion of his duties,
 - (i) render a final account of his administration in the form adopted for interim accounts under clause (f),
 - (ii) send a copy of the final report to the Registrar who shall file it, and
 - (iii) send a copy of the final report to each director of the corporation.

Personal Property Security Act, S.A. 1988 c. P-4.05.

Receiver

65(1) A security agreement may provide for the appointment of a receiver and, except as provided in this or any other Act, his rights and duties.

(2) A receiver shall

(a) take into his custody and control the property of the debtor in accordance with the security agreement or order under which he is appointed, but unless appointed a receiver-manager or unless the Court orders otherwise, shall not carry on the business of the debtor,

(b) where the debtor is a corporation, immediately notify the Registrar of Corporations of his appointment or discharge.

(c) open and maintain a bank account in his name as receiver for the deposit of all money coming under his control as a receiver,

(d) keep detailed records, in accordance with accepted accounting practices, of all receipts, expenditures and transactions involving collateral or other property of the debtor,

(e) prepare at least once in every 6-month period after the date of his appointment financial statements of his administration that, as far as is practical, are in the form required by section 149 of the *Business Corporations Act*, and

(f) on completion of his duties, render a final account of his administration in the form referred to in clause (e), and, where the debtor is a corporation, send copies of the final account to the debtor, the directors of the debtor and to the Registrar of Corporations.

(3) The debtor, and where the debtor is a corporation, a director of the debtor, or the authorized representative of any of them, may, by a demand in writing given to the receiver, require the receiver to make available for inspection the records referred to in subsection (2)(d) during regular business hours at the place of business of the receiver in the Province.

(4) The debtor, and where the debtor is a corporation, a director of the debtor, a sheriff, a person with an interest in the collateral in the custody or control of the receiver, or the authorized representative of any of them, may, by a demand in writing given to the receiver, require the receiver to provide copies of the financial statements referred to in subsection (2)(e) or the final account referred to in subsection (2)(f) or make available such financial statements or final account for inspection during regular business hours at the place of business of the receiver in the Province.

(5) The receiver shall comply with the demands referred to in subsection (3) or (4) not later than 10 days from the date of receipt of the demand.

(6) The receiver may require the payment in advance of a fee in the amount prescribed for each demand made under subsection (4), but the sheriff and the debtor, or in the case of an incorporated debtor, a director of the debtor, are entitled to inspect or to receive a copy of the financial statements and final account without charge.

- (7) On the application of any interested person, the Court may
- (a) appoint a receiver;
 - (b) remove, replace or discharge a receiver whether appointed by the Court or pursuant to a security agreement;
 - (c) give directions on any matter relating to the duties of a receiver;
 - (d) approve the accounts and fix the remuneration of a receiver;
 - (e) exercise with respect to a receiver appointed under a security agreement the jurisdiction it has with respect to a receiver appointed by the Court;
 - (f) notwithstanding anything contained in a security agreement or other document providing for the appointment of a receiver, make an order requiring a receiver or a person by or on behalf of whom he is appointed, to make good any default in connection with the receiver's custody, management or disposition of the collateral of the debtor or to relieve such person from any default on such terms as the Court thinks fit.
- (8) The powers referred to in subsection (7) and in section 64 are in addition to any other powers the Court may exercise in its jurisdiction over receivers.
- (9) Unless the Court orders otherwise, a receiver is required to comply with sections 60 and 61 only when he disposes of collateral other than in the course of carrying on the business of the debtor.

PART 6

MISCELLANEOUS

Proper exercise
of rights, duties
and obligations

- 66(1) All rights, duties or obligations arising under a security agreement under this Act or under any other applicable law shall be exercised or discharged in good faith and in a commercially reasonable manner.
- (2) A person does not act in bad faith merely because the person acts with knowledge of the interest of some other person.

APPENDIX II

Cases Relied Upon

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